



THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY:

Privy Council	... C. BOULNOIS, <i>Middle Temple.</i>
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tice from 6th Ap-
ril to 2th Au-
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FULL BENCH.

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Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr.
Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.
DALGANJAN SINGH (PLAINTIFF) v. KALKA SINGH AND OTHERS
(DEFENDANTS).*

*Pre-emption—Wajib-ul-arz—Perfect partition of mahal—Act No. XIX of
1873 (N.-W. P. Land Revenue Act), Section 191—No new wajib-ul-arz
framed on partition—Pre-emption claimed under wajib-ul-arz of
undivided mahal—Custom—Co-sharers—“Hissadar deh.”*

Where, on the perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, no new wajib-ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer. It depends in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom recorded, assuming that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom. But there is a strong presumption against such claims for pre-emption when made after perfect partition by persons who are no longer co-sharers of the vendor; and where the language of the wajib-ul-arz is ambiguous this presumption may be decisive.

The wajib-ul-arz of a village forming one undivided mahal recorded a right of pre-emption by custom as existing in favour of “*hissadaran deh*” in cases of transfer by a “*hissadar*” of his share or “*hissa*” to a stranger. After a perfect partition, on which no new wajib-ul-arz was framed, and after a subsequent sale to a stranger of land in one of the new mahals, a person who, prior to the partition, was a co-sharer of the vendor in the undivided mahal, but who, since the partition, owned a share only in another of the new mahals, claimed pre-emption under the old wajib-ul-arz as a “*hissadar deh*.”

Held by the Full Bench, upon the construction of the wajib-ul-arz, that he was not entitled to pre-emption.

* Appeal No. 84 of 1898, under section 10 of the Letters Patent.

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THIS was an appeal under section 10 of the Letters Patent arising out of a suit for pre-emption of a piece of land in the village of Serai Sitam in the Jaunpur district, the suit being based on a custom recorded in the wajib-ul-arz of that village framed at the last Settlement in 1880-81. The suit was brought in September 1896. The village, which at the time of the settlement had consisted of only a single mahal, was divided by perfect partition, in 1888 or 1889, into three mahals, but no new wajib-ul-arz was framed for any of the new mahals. The plaintiff pre-emptor was not a sharer in the mahal in which the property sold was situated. The Court of first instance (Munsif of Jaunpur) and the lower appellate court (Subordinate Judge) held that the plaintiff was entitled to pre-emption by the custom of the village notwithstanding the partition, and decreed the claim. On appeal by the defendants to the High Court, a single Judge of the Court allowed the appeal and dismissed the suit. From that decree the present appeal under section 10 of the Letters Patent was preferred by the plaintiff. The facts of the case will be found stated in greater detail in the judgment of the Chief Justice. The substantial question raised by the appeal was—what is the effect of a perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, upon claims for pre-emption based on a custom recorded in the wajib-ul-arz where no new wajib-ul-arz for any of the new mahals has been framed at or since the partition?

Babu *Durga Charan Banerji* for the appellant (pre-emptor).

The learned Judge has dismissed the appellant's suit upon the solitary ground that upon perfect partition the old wajib-ul-arz disappears with the legal entity to which it applied, and therefore no suit will lie for pre-emption. I submit that there is no such rule of law. The Land Revenue Act gives no sanction to such a view. On the other hand the Land, Revenue Act and the case law support the contention that a record-of-rights may remain in force even after the term for which it was prepared. Section 191 of the Land Revenue Act lays down that if no new

wajib-ul-arz is prepared, the existing wajib-ul-arz remains in force, even after the settlement, when it is not superseded by a new one—*Shiam Sundar v. Amanant Begam* (1). In *Sadhu Sahu v. Raja Ram* (2) it has been held that even after the expiration of the term for which a wajib-ul-arz is prepared, the old wajib-ul-arz may be good evidence of custom.

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If the wajib-ul-arz is in force, the plaintiff who is still a shareholder in the village (though not in the mahal) is entitled to pre-empt as a *hissadar deh*. The entity *deh* (village) has not ceased to exist with the partition. The area still exists, though for fiscal purposes it has been divided into separate portions which for such purposes are independent of one another.

If the wajib-ul-arz recorded a contract, such contract ran with the land and would not be abrogated, there having been no novation in the shape of a fresh wajib-ul-arz. If it is a record of custom, such custom applied to the area *deh*, and partition for revenue purposes would not affect such custom. The wajib-ul-arz is a record-of-rights prepared under the Land Revenue Act. The Collector has to keep and maintain the record, and he is required to note any changes which may occur during the term of the settlement for which such record is prepared. This evidently contemplates alteration in the existing record. Changes in such record consequent upon partition should be noted,—see sections 94 to 102 of the Act.

Upon the construction of the particular wajib-ul-arz in question, *hissadar* means a shareholder and not necessarily a co-sharer. The plaintiff still holds a share in the village, and upon that account he is entitled to claim pre-emption.

I rely upon *Gokal Singh v. Mannu Lal* (3), *Ramjiawan Sahu v. Raturaj Singh* (4), *Shiam Sundar v. Amanant Begam* (5), *Kuar Dut Prasad Singh v. Nahar Singh* (6), *Abbas Ali v. Ghulam Nabi* (7), *Mata Din v. Mahesh Prasad* (8).

(1) (1887) I. L. R., 9 ALL., 234.

(2) (1893) I. L. R., 16 ALL., 40.

(3) (1885) I. L. R., 7 ALL., 772.

(4) Weekly Notes, 1889, p. 81.

(5) (1887) I. L. R., 9 ALL., 234.

(6) (1888) I. L. R., 11 ALL., 257.

(7) Weekly Notes, 1891, p. 187.

(8) Weekly Notes, 1892, p. 100.

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In *Lachcho v. Maya Ram* (1), relied upon by the other side, a new wajib-ul-arz had been prepared which abrogated the old one.

I also rely on *Ghure v. Man Singh* (2), which indirectly supports my contention.

Mr. *Abdul Majid* for the respondents:—

The question is, what is the meaning of the word village (*deh*) and what is the meaning of the word share (*hissa*) and shareholder (*hissadar*) used in the wajib-ul-arz? The wajib-ul-arz was framed for the mahal of Serai Sitam. The co-sharers before the village was partitioned were the existing co-sharers of the mahal Serai Sitam. The village and mahal Serai Sitam were both one and the same. But when the village was partitioned and divided into several mahals, the co-sharers of the separated mahals could not be said to remain still co-sharers of the old mahal Serai Sitam. There is nothing joint between them now in the new mahals. The words '*deh*' and '*hissa*' and '*hissadar*' must be used in one sense in the whole wajib-ul-arz whenever those words are used.

The old wajib-ul-arz which was framed for the mahal Serai Sitam has disappeared when the said mahal was partitioned into these new mahals, inasmuch as the mahal for which it was prepared has disappeared.

The following cases cited are distinguishable from the present case.

Gokal Singh v. Mannu Lal (3), *Ramjiawan Sahu v. Raturaj Singh* (4), *Shiam Sundar v. Amanant Begam* (5), *Kuar Dat Prasad Singh v. Nahar Singh* (6), *Abbas Ali v. Ghulam Nabi* (7) and *Mata Din v. Mahesh Prasad* (8).

I rely on the following cases:—

Motee Sah v. Mussumat Goklee (9), *Moolchund v. Rugha Singh* (10), *Joobraj Singh v. Tookun Singh* (11), *Shaikh Bunday*

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|------------------------------------|---|
| (1) (1895) I. L. R., 17 All., 226. | (6) (1888) I. L. R., 11 All., 257. |
| (2) (1882) I. L. R., 5 All., 153. | (7) Weekly Notes, 1891, p. 137. |
| (3) (1885) I. L. R., 7 All., 772. | (8) Weekly Notes, 1892, p. 100. |
| (4) Weekly Notes, 1889, p. 81. | (9) S. D. A., N.-W. P., 1861, Vol. I., 506. |
| (5) (1837) I. L. R., 9 All., 234. | (10) S. D. A., N.-W. P., 1864, Vol. I., 96. |
| | (11) (1870) 14 W. R., C. R., 476. |

Hossein v. Lalla Puriag Dutt (1), *Ram Pershad v. Buljeet Singh* (2), *Jai Ram v. Mahabir Rai* (3), *Abdul Rahim Khan v. Kharag Singh* (4), *Nazir-ud-din v. Kadir Baksh* (5), *Abdul Aziz Khan v. Husen Ali Khan* (6), *Abdul Hai v. Nain Singh* (7), *Ghure v. Man Singh* (8) and *Mithu Lal v. Muhammad Ahmad Said Khan* (9).

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STRACHEY, C.J.—This appeal raises a question which has been discussed in many previous decisions of this Court, the effect of a perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, upon claims for pre-emption based on a custom recorded in the wajib-ul-arz, where no new wajib-ul-arz for any of the new mahals has been framed at or since the partition. The present suit for pre-emption is based on the wajib-ul-arz of a village, Serai Sitam, in the Jaunpur district. The sale which it seeks to avoid was a sale of 7 bighas of land in that village, and was made on the 29th September 1896. The wajib-ul-arz was framed at the last settlement in 1880-81. The part of it relating to pre-emption is contained in chapter 11, which is headed "As to the rights of co-sharers among themselves based on custom or agreement." Section 13 of the chapter is headed "As to the custom of right of pre-emption." In regard to the precise English equivalents of some of the expressions used in the pre-emption clause, there has been some dispute. The following is a translation of the clause, leaving the disputed terms as they stand in the original :—

"If any *hissadar* wishes to transfer his share (*hissa*), first he will transfer it to his own brother, then to his near relatives, thirdly to owners in the village who are partners in the same *khata* (*malikan sharik khata*), fourthly to the *hissadaran deh* : if none of these purchase, then he is competent to transfer it to anyone he likes."

(1) (1871) 16 W. R., C. R., 110.

(2) N.-W. P. H. C. Rep., 1867, 252.

(3) (1885) I. L. R., 7 All. 720.

(4) Weekly Notes, 1892, p. 240.

(5) Weekly Notes, 1894, p. 193.

(6) Weekly Notes, 1895, p. 233.

(7) (1897) I. L. R., 20 All., 92.

(8) (1895) I. L. R., 17 All., 226.

(9) Weekly Notes, 1899, p. 19.

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The plaintiff claims pre-emption as one of the fourth class of pre-emptors mentioned in the clause, the *hissadaran deh*. The defendant vendee is admittedly a stranger to the village. It is not disputed that until 1888 or 1889 the plaintiff would have been entitled to pre-emption under the *wajib-ul-arz* as a *hissadar deh* in respect of such a sale as that of the 29th September 1896. Up to that time the village Serai Sitam formed a single mahal, of which both the plaintiff and the defendant vendor were co-sharers. But in 1888 or 1889 the mahal was divided by a perfect partition into three separate mahals. The plaintiff is a co-sharer in one of the new mahals: the property in suit is situate in another, in which he is not a co-sharer. No new *wajib-ul-arz* has been framed for any of the new mahals. The suit is based upon the custom of pre-emption alleged by the plaintiff to prevail in the village Serai Sitam, and upon the status of the plaintiff as a *hissadar* of the village within the meaning of the *wajib-ul-arz*. The principal defence was that no such custom existed, and that upon the partition of Serai Sitam the pre-emption clause of the *wajib-ul-arz* of 1880-81 ceased to have effect. No evidence of the custom except the *wajib-ul-arz* was produced. Upon that document the Courts below decided that the custom was proved, and that the plaintiff was entitled to pre-emption in accordance with the *wajib-ul-arz*, notwithstanding the partition. On appeal by the defendants to this Court, Mr. Justice Blair stated the question involved as "whether the *wajib-ul-arz* of a mahal before partition applies to each part which is partitioned off into a separate mahal and said that there had been of late years a *cursus curiæ* according to which many, if not all, of the Judges of this Court had held in principle "that the old *wajib-ul-arz* disappears with the legal entity to which it applied." He accordingly set aside the decree of the Court below and dismissed the suit, and in this appeal under the Letters Patent we have to say whether his decision was right.

It appears to me to be incorrect to say that, upon a perfect partition of a mahal, the *wajib-ul-arz* necessarily "disappears"

or ceases to exist. There is no such general rule of law. The wajib-ul-arz forms part of the record-of-rights which the settlement officer has to frame for each mahal under section 62 of the Land Revenue Act. It is true that both that section and section 3(1) speak of this document as the record-of-rights for the mahal, and this suggests that when the mahal is destroyed by perfect partition the record-of-rights becomes inoperative. But section 191 provides that "in all cases the existing record-of-rights shall remain in force until a new record-of-rights is framed." It was held by this Court in *Kedar Nath v. Ram Dial* (1), that the Collector had an implied power, upon the partition of a mahal, to frame a new record-of-rights for each of the new mahals so constituted. It was further held in *Abdul Hai v. Nain Singh* (2) that it was the duty of the Collector or Assistant Collector to do so. Where that is done, the old wajib-ul-arz is, of course, superseded. But it is often not done, and, in the absence of any such new wajib-ul-arz, the old wajib-ul-arz remains in force except so far as its provisions are inconsistent with the state of things which the partition has created. That was expressly held to be "clear law" by Mr. Justice Blair in *Mithu Lal v. Muhammad Ahmad Said Khan* (3). Then, if the wajib-ul-arz as a whole is not necessarily abrogated by a perfect partition, is there any more ground for holding that the pre-emption clause of it is so abrogated? In the case just referred to, Mr. Justice Aikman said that he could not draw the conclusion that the custom of pre-emption recorded in the old wajib-ul-arz had fallen into abeyance from the fact that the officer who carried out the partition omitted to prepare a new wajib-ul-arz. If the custom may still be in force, the wajib-ul-arz is still good evidence of it. Some of the decisions cited to us appear to lay down a general rule of law that, after a perfect partition, no claim for pre-emption can be successfully made on the basis of the old wajib-ul-arz. Others, going to the opposite extreme,

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(1) (1893) I. L. R., 15 All., 410. (2) (1897) I. L. R., 20 All., 92.
(3) (1898) Weekly Notes, 1898, p. 19.

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appear to regard partition as a purely fiscal arrangement concerned exclusively with the collection of the Government revenue, and having no possible bearing upon any contract or custom of pre-emption. Both views appear to me equally open to the objection that they treat as an abstract question of law what is really a question of the construction of a particular contract or the interpretation and application of a particular custom. In many of the cases the terms of the particular pre-emption clause upon which the decision properly depended are not even referred to. This mistaken way of looking at the subject appears to me to account for much of the conflict of authority which undoubtedly exists. The pre-emption clause of a *wajib-ul-arz* may constitute either a contract of the co-sharers or the record of a custom found by the settlement officer to prevail among them. In all that follows, I assume that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom. Upon that supposition, where the clause constitutes a contract, the question whether or how far it is applicable after a perfect partition is one of the proper construction of its terms. In other words, the question is whether the intention of the parties as expressed in the clause was that the right of pre-emption should exist only so long as the village remained a single mahal, of which they were the co-sharers, or that it should be wholly unaffected by the destruction of the mahal and the severance of that co-parcenary bond, or that it should be claimable after partition by those only who continued to be co-sharers in any of the separate mahals. If the contract unmistakeably confined the right to the existing co-parcenary body, there can be no doubt that it would not survive the partition. If it contained this express covenant—"no person hereby entitled to pre-emption shall be deprived of his right by any perfect partition of the mahal"—it would be difficult to contend that partition would affect the right. If it expressly provided that all who were still co-sharers should have the right notwithstanding any perfect partition, then those who continued to be

co-sharers in any of the new mahals, but no others, would have a good claim. If, in any of these three cases, the terms used were less clear, the question would still be whether the same intention was to be inferred from them. Again, where the clause does not constitute a contract but records a custom, the question is still one of its true meaning, though in this case, considering that the wording of the clause is often the composition of some ignorant subordinate whose accuracy cannot be assumed, the only safe course is to look to the substance of the thing, and not to attach undue weight to the particular expressions used. The question is whether the custom is one which necessarily presupposes the continuance of the co-parcenary body existing at the time when the clause was framed. If the custom recorded is one by which the right of pre-emption is confined to co-sharers of the then existing mahal, then it appears to me that it can no more exist in favour of others after the mahal and that particular co-parcenary body have been destroyed by perfect partition than any other custom can continue after the class among which it has always prevailed has perished. On the other hand, it is possible to imagine a custom of pre-emption which does not depend upon the continued existence of the undivided mahal and its co-parcenary body. A custom in favour of the brothers, or other near relatives of the vendor, might be an instance. Again, when a settlement officer records a custom of pre-emption in the wajib-ul-arz of a new mahal created by perfect partition of an old one, what is that custom? It cannot be something absolutely new, or the word custom would be a misnomer. It must therefore be something which existed before the new mahal and before the partition, something therefore which existed in the time of the old mahal, which has survived the partition, and which is recognized as still applicable within the new mahal. In one of the cases cited to us, and no doubt in a great many other cases, the settlement officer simply copied *verbatim* in the new wajib-ul-arz the pre-emption clause of the old one. This implies that the old custom thus continued is regarded as a custom

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of the co-sharers, still applicable to all who, notwithstanding the partition, stand in the relation of co-sharers, not a custom necessarily confined to co-sharers while members of the co-parcenary body of the old undivided mahal. For these reasons, the decisions which treat the question of the effect of a perfect partition upon the pre-emption clause as capable of an absolute and invariable answer appear to me to be based upon a wrong principle.

At the same time, it would be a mistake to conclude that in deciding whether a contract or a custom of pre-emption recorded in the wajib-ul-arz is applicable after a perfect partition, no general considerations are of any value. In every case we must place ourselves as nearly as possible in the position of the parties and have regard to the surrounding circumstances. In particular, we must remember what is the nature of the co-parcenary body in an undivided mahal, the nature of the wajib-ul-arz prepared by the settlement officer, the meaning and object of re-emption, and the meaning and object of perfect partition. The most essential feature of the co-parcenary body is the joint and several responsibility of the co-sharers for the payment of the Government revenue assessed on the mahal, coupled in cases of zamindari tenure with the holding and management of the whole of the lands of the mahal by all the co-sharers in common. It is for the mahal, for the "local area held under a separate engagement for the payment of the land revenue," not for a village or other local area not being a mahal, that the settlement officer frames the wajib-ul-arz. It is meant as a record of the contracts or the customs of the co-sharers of the mahal. This being its object, it is *prima facie* unlikely to include any contract or custom which is absolutely independent of the continuance of the mahal as a fiscal and proprietary unit or of the co-parcenary body for which it is framed. Next, what is pre-emption? It is a right very closely connected with the objects of the co-parcenary system. Its essential purpose is the exclusion of strangers and the maintenance of the existing proprietary body throughout all changes of ownership. It thus *prima facie*

implies that the co-parceners desire to preserve and not to destroy their mutual connection, and is *prima facie* inapplicable after that connection has been severed by a perfect partition. Lastly, what is a perfect partition? It is defined by section 107 of the Act as "the division of a mahal into two or more mahals." Its object is the exact opposite of the object of pre-emption: it is to completely break up the connection hitherto existing between the co-sharers; to put an end to their joint and several responsibility for payment of Government revenue; to destroy altogether the distinction between them and strangers. Sometimes partition is effected in order to get rid of a quarrelsome or litigious co-sharer who seeks to take more than the others consider him entitled to: *Ghure v. Man Singh* (1), *Mithu Lal v. Muhammad Ahmad Said Khan* (2). Sometimes it is because some of the co-sharers "do not pay their quota of the Government revenue regularly, thereby bringing liability for their arrears upon all the co-sharers of the mahal:" *Abdul Hai v. Nain Singh* (3). Whatever the reason, the co-sharers can no longer get on comfortably together, and partition is the process which enables them to separate. It is therefore *prima facie* unlikely that, in the case of a contract, the co-sharers should intend that pre-emption, which implies the distinction between the co-parceners and outsiders, should continue after a partition by which that distinction is abolished. It is also unlikely, as pointed out by Mr. Justice Knox in *Ghure v. Man Singh*, that a custom "recorded at a time when the village bore its natural and, from a Hindu point of view, proper form of an undivided village and an undivided mahal," would be applicable "when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place." I agree with him that it would require "strong proof to establish that a custom which regulated and provided for one set of circumstances still regulates and

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at p. 288.(2) (1898) Weekly Notes, 1899,
at p. 21.

(3) (1897) I. L. R., 20 All., at p. 94.

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provides when these circumstances have been wholly altered." I also agree with the learned Judges who decided *Abdul Hai v. Nain Singh* that "it would require very strong evidence to satisfy us that after shareholders in a mahal have applied for and obtained partition and consequent separation of their interest from other shareholders in the mahal, they intended that the other co-sharers from whom they had separated their interest should be entitled to come in and pre-empt in the new mahal, and become again their co-sharers." Some of these considerations obviously do not apply where the right is claimed after partition by persons who, having been co-sharers in the undivided mahal, are still co-sharers with the vendor in one of the separate mahals. Partition has not, as regards them, made so radical a change, they are as closely united as before, though by a new bond; there is still the distinction between them and strangers which it is the object of pre-emption to preserve. The inference which I draw is that while it depends in every case on the particular circumstances and especially upon the terms of the particular *wajib-ul-arz*, whether or how far pre-emption can be claimed under it after a perfect partition, there is a strong presumption against such a claim when made by persons who are no longer co-sharers of the vendors. Where the language of the *wajib-ul-arz* is ambiguous, this presumption may be decisive.

The earliest case which was cited to us is *Motee Sah v. Musummat Goklee* (1). The terms of the *wajib-ul-arz* are not stated in the report, and it does not appear whether the claim for pre-emption was based upon contract or upon custom. The judgment contains this passage:—"Now, an essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." I infer that the *wajib-ul-arz* in that case confined the right of pre-emption to co-parceners

. (1) S. D. A., N.-W. P., 1861, Vol. I, p. 506.

of the vendor, and that after the partition the plaintiff was not such a co-parcener in one of the new mahals. Upon that assumption the decision was no doubt right. If, however, the passage means that, whatever the terms of the wajib-ul-arz, no one can in any case successfully claim pre-emption who is not a co-parcener of the vendor, it is, in my opinion, too widely expressed. The unreported case of *Abdullah Khan v. Halimunnissa* (F. A. No. 69 of 1882) is cited in *Shiam Sunder v. Amanant Begam* (1) as laying down the rule that, despite the partition of a village into separate mahals, the existing wajib-ul-arz at the time of partition must be presumed to subsist and govern the separate mahals until it is shown that a new one has been made. No such proposition is to be found in any of the three judgments successively remanding the case, nor in the judgment finally disposing of the appeal. The precise terms of the pre-emption clause do not appear from the paper-book, but it was a contract giving the right to "sharers" or "owners." The plaintiffs did not, after the partition, own any share in the new mahal in which the property sold was situate. The remand order of the 22nd April, 1884, contained this passage:—"In our opinion the wajib-ul-arz, never having been withdrawn, is still binding, and the plaintiffs-appellants are entitled to come into Court to enforce its terms, if they can show themselves to be, and this is admitted that they are, co-sharers in the villages of Khushalpur and Majri." As, however, the High Court apparently accepted the lower Court's finding on remand that the villages in question had not been partitioned in the manner and with the formalities required by the Land Revenue Act, I cannot regard that case as instructive. The next case is *Gokal Singh v. Mannu Lal* (2) decided by Petheram, C.J., and Mahmood, J, in 1885. The pre-emption clause is not set out in the report, but apparently it contained a contract, and gave the right of pre-emption to persons described in the report as "shareholders" or "partners" in the "village," but in the Subordinate Judge's judgment as "co-sharers" or

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(1) (1887) I. L. R., 9 All., 234; at p. 238. (2) (1885) I. L. R., 7 All., 772.

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"co-parceners." In the undivided village the two plaintiffs held a one-third share, and the vendor and another person one-third each. There was a perfect partition by which each one-third share was divided from the others and made a separate mahal. After the partition, therefore, the plaintiffs were still co-sharers, but no one was a co-sharer of the vendor, who was the sole proprietor of one of the separate mahals. The sale to which the suit related was of the whole of that mahal. The judgment of Petheram, C.J., appears to have been based, first on the use of the word "village" as distinguished from "mahal," and secondly, on the view that the word "shareholder," "partner" or the like would, notwithstanding the partition, still apply to persons "living in" the village and sharing in the common use of roads, drains and other public things. This interpretation of the word shareholder as referring not to proprietary interest but to residence and participation in the use of roads and drains is very singular. Mahmood, J., whom the report represents as simply concurring with Petheram, C.J., delivered a separate written judgment, which appears to have escaped the Reporter's notice. He apparently held that the partition was not "perfected" or complete so as to constitute the separate mahals until a new *wajib-ul-arz* had been framed for each divided portion of the original mahal. So far as I know, there is no other authority for that view. The learned Judge further held that the pre-emption clause of the old *wajib-ul-arz*, not having been superseded by any new covenant, was still in force. "The mere apportionment of revenue and the disavowance of the liability to that revenue could not, *ipso facto*, defeat a covenant relating to pre-emption entered into by all the co-sharers for the time being, and which covenant ran as an incident of the tenure of the lands owned by them before such partition. In the second place, the terms of the pre-emption clause of the *wajib-ul-arz* speak not of the co-sharers of the mahal but of the village, and the distinction between these two terms seems to me sufficiently obvious, as explained by the learned Chief Justice." It appears to me that the whole question was whether the plaintiffs,

when they brought their suit, were co-sharers of the village within the meaning of the contract. That depended on whether the pre-emption clause meant by co-sharers of the village all persons owning shares within any part of the village area, or all whose shares were co-extensive with the whole of that area, or all who, whether in the whole or in part of the village, were co-sharers of the vendor. If it had the first meaning, then the plaintiffs, being co-sharers of one of the mahals into which the village was divided, were entitled to pre-emption. If it had the second meaning, neither the plaintiffs nor anyone else were entitled to pre-emption, for the class of co-sharers of the village in that sense ceased to exist when the partition was made. If it had the third meaning, the plaintiffs were not entitled to pre-emption, for they were not co-sharers of the vendor, who was the sole proprietor of his mahal. The next case is *Jai Ram v. Mahabir Rai* (1). The terms of the wajib-ul-arz are not stated in the report. From the paper-book it appears that the pre-emption clause gave a right of pre-emption (apparently by custom) "to brothers and sharers of of the thoke, and if the thokewallah refuses, then to other shareholders." There was a partition by which one of the pattis of the mahal was divided from the rest and made a separate mahal. A new wajib-ul-arz was framed for the new mahal, giving a right of pre-emption to the co-sharers of that mahal, but not to the co-sharers of the pattis remaining with the original mahal. There was a sale of property, part of which was in the new mahal and part in the other pattis. A co-sharer in those pattis, but not in the new mahal, sued for pre-emption, excluding from the suit so much of the property sold as was situate in the new mahal. The defendant pleaded that, according to certain rulings of this Court, a suit for pre-emption could not be maintained in respect of part only of the property sold. The plea was overruled and the suit decreed, on the ground that as the suit included all the property sold which the plaintiff was entitled to pre-empt, the rulings referred to were inapplicable. Mahmood, J., held that the effect of the partition

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was to exclude property in the new mahal from the operation of the old wajib-ul-arz, and to place it under the new wajib-ul-arz which gave the plaintiff no right of pre-emption. Oldfield, J., without referring to the new wajib-ul-arz, held as to the old one that "the condition as to pre-emption only affected the shareholders of the mahal so long as they remained shareholders, and ceased to have effect upon those shareholders and their property who separated themselves and their property by forming a separate mahal. The plaintiff could, after the separation, exercise no right of pre-emption against and in respect of shareholders and property so separated, nor could the separated shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated." It is noticeable that no suggestion appears to have been made that the partition affected the plaintiff's right under the old wajib-ul-arz to pre-empt the property not situate in what was called "the new mahal." The judgments treat the partition not as destroying the "old mahal"—that is, the undivided mahal—but as merely detaching from it and converting into a new and separate mahal one of its pattis. It follows, however, from the definition in the Land Revenue Act of perfect partition as "the division of a mahal into two or more mahals," that after the partition both the mahals were "new," the old mahal with its co-parcenary body had disappeared, and for it were substituted two new mahals, each with a separate co-parcenary body of its own. Whether in that view the right of pre-emption given by the old wajib-ul-arz to the co-sharers of the original undivided mahal could be claimed by a co-sharer of the larger of the two mahals into which it was divided, was a question not considered by the Court. In *Shiam Sundar v. Amanant Begam* (1) decided by Straight and Tyrrell, JJ., in 1887, the pre-emption clause was described as a contract. At the time when the wajib-ul-arz was framed, the plaintiff was a co-sharer with the vendor in the three villages to which it related. It gave a right of pre-emption to "shareholders"

(1) (1887) I. L. R., 9 All., 234.

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(1) (1887) I. L. R., 9 All., 234.

or "co-sharers" in the village or manza. Afterwards there was a perfect partition by which the plaintiff's shares were formed into a separate mahal, of which he was the sole proprietor, but no new wajib-ul-arz was made. The judgments do not discuss the terms of the wajib-ul-arz upon which the claim was based. They state the question for decision as "whether, this partition having taken place, the conditions of the wajib-ul-arz which subsisted prior thereto, and which has not been replaced by another, are still effectual and binding on all the persons who were originally co-sharers in the villages." Upon this they observe:—"The question is by no means without difficulty, and, were it *res integra*, we should have had some doubts in deciding it. There are, however, two rulings of Division Benches of this Court—one *Gokal Singh v. Mannu Lal* (1) and the other an unreported case, F. A. No. 69 of 1882—the former of which has been followed in the present suit by the Court below, that are directly in point. We are not prepared, as at present advised, to reconsider the rule therein laid down, to the effect that despite the partition of the village into separate mahals, the existing wajib-ul-arz at the time of partition must be presumed to subsist and govern the separate mahals until it is shown that a new one has been made. We may add that this view is supported by the terms of the second paragraph of section 191 of the Revenue Act of 1873." In this passage the effect of the two cases cited is not, in my opinion, accurately stated. No such rule or presumption is laid down in either. The second paragraph of section 191 only provides that the existing record-of-rights shall remain in force until a new record-of-rights is made. It implies no presumption as to the construction to be placed on the terms of the wajib-ul-arz, nor as to whether co-sharers in the separate mahal, or even a sole proprietor of one of them, can claim the benefit of a pre-emption clause in favour of co-sharers in the undivided mahal. The case of *Kuar Dat Prasad Singh v. Nahar Singh* (2) decided by Straight and Mahmood, JJ., in 1888, does not throw much

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(1) (1885) I. L. R., 7 All., 772.

(2) (1888) I. L. R., 11 All., 257.

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light on the subject. There was no question of the application after partition of a wajib-ul-arz framed for an undivided mahal. There was a perfect partition of a village into two separate mahals, for each of which a wajib-ul-arz was framed. The suit was based on one of these wajib-ul-arzes; it was brought by a co-sharer in the mahal, though not in that patti of the mahal in which the property sold was situate; and the question was whether, according to the pre-emption clause, such a co-sharer was entitled to preference over the vendee who was a co-sharer in a patti of the other mahal. The judgment was based on the terms of the wajib-ul-arz, but it contained this passage:—"It must be distinctly understood that this view of this particular wajib-ul-arz in no way ignores any other decision that may have been passed in cases where one wajib-ul-arz having existed for the purpose of a common village area, and that village area having been divided into separate revenue areas, and no new wajib-ul-arz having been drawn up, such wajib-ul-arz has been held to apply generally to the new area. The principle upon which that view of the law is based is to be found stated in the case of *Gokal Singh v. Mannu Lal*, and this principle, which is further elaborated in another ruling at page 720 of the same volume (*Jai Prasad v. Mahabir Rai*) is that this pre-emptive right runs with the land, and the division of that land for the purposes of the revenue in no way affects any covenant or agreement existing between the co-sharers." That is, in my opinion, a misleading description of the effect of perfect partition, an inaccurate account of the case of *Gokal Singh v. Mannu Lal*, and a most extraordinary misconception of the judgments in *Jai Prasad v. Mahabir Rai*. The learned Judges in the latter case did not elaborate any principle stated in the former, and, so far from holding that the pre-emptive right ran with the land and that partition did not affect any agreement between the co-sharers, held, as nearly as possible, the very reverse.

In *Ramjiawan Sahu v. Raturaj Singh* (1) decided by Straight and Tyrrell, JJ., the question was whether under the

(1) Weekly Notes, 1889, p. 81.

wajib-ul-arz of an undivided village, which gave rights of pre-emption to "co-sharers," the plaintiff as a co-sharer of one only of the two separate mahals into which the original mahal had been divided, could pre-empt property in the other. No new wajib-ul-arz had been framed. The learned Judges held that "the right of pre-emption was one created by agreement between the co-sharers of the village, and constituted a covenant which attached to and ran with the land. The mere fact that for purposes of revenue the village has been divided into two revenue-paying areas does not put an end to that covenant, which still attaches to all the land which formed a part of the original village unit, and will until it is abrogated. In support of this view, we may refer to I. L. R., 7 All., 772." I cannot agree either with the conception of pre-emption as a covenant running with the land, or with the conception of a perfect partition as an exclusively fiscal operation involving no material change in the pre-emptor's status as a co-sharer, or with the view that either conception is supported by *Gokal Singh v. Mannu Lal*. To describe pre-emption as a covenant running with the land is to misapply a technical term of English real property law. To describe perfect partition as concerned exclusively with "purposes of revenue" is to ignore half its effect. In *Abbas Ali v. Ghulam Nabi* (1) Knox, J., held in substance that the partition of a village consisting of a single mahal into two separate mahals, in one of which the plaintiff and the vendor were co-sharers, and in the other the vendee was a co-sharer, did not render the previously framed wajib-ul-arz inapplicable, and that under it the vendee was equally entitled with the plaintiff as a co-sharer of the vendor. The learned Judge did not discuss the effect of the word which he translated "shareholder," but merely observed that the case was one in which the principle which should guide the Court was that contained in *Gokal Singh v. Mannu Lal*, and in another case which does not seem very applicable. The circumstances of the next case, *Mata Din v. Mahesh Prasad* (2) were peculiar. There

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(1) Weekly Notes, 1891, p. 137.

(2) Weekly Notes, 1892, p. 100.

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was a village or mauza originally forming a single mahal, and the wajib-ul-arz gave a right of pre-emption to "hissadaran" (translated by the learned Judge as "co-sharers") not of the "mahal" but of the "mauza." There was a perfect partition of the village into three mahals, for each of which a new wajib-ul-arz was framed, and in each the pre-emption clause was copied *verbatim* from the old wajib-ul-arz. At that time one of the new mahals belonged to a single owner. Upon the sale of property in that mahal a suit for pre-emption was brought by a person who was a co-sharer in another of the new mahals. Mr. Justice Mahmood held that the plaintiff was entitled to pre-emption as a co-sharer of the mauza, notwithstanding the partition and the fact that he was not a co-sharer of the vendor in the mahal where the property was situate. Although the judgment refers to some of the previous cases, it treats the question as strictly one of the intention of the parties to the contract contained in the wajib-ul-arz. The learned Judge held that, from the use in that wajib-ul-arz of the expression "co-sharers of the mauza" as distinguished from the mahal, from its exact reproduction of the pre-emption clause of the wajib-ul-arz of the undivided village, and from the circumstance that when the new wajib-ul-arzes were framed one of the new mahals belonged to a single owner, it was to be inferred that the parties to those instruments intended to preserve the right of pre-emption on its original footing as a right to be enjoyed by all who were formerly co-sharers of the mauza, notwithstanding the partition. It was as if each new wajib-ul-arz had said, "the right of pre-emption shall belong not only to the co-sharers of this mahal but to all persons who, prior to the partition, could have claimed pre-emption under the old wajib-ul-arz as co-sharers of the undivided mauza." In other words, they desired to confine the effect of the partition as nearly as possible to "fiscal purposes as to the payment of Government revenue," and to retain some distinction between the old co-parcenary body and total strangers to the village. Whether Mr. Justice Mahmood's conclusions

in that particular case were correct or not, I cannot doubt that his method of deciding it upon the construction of the contract contained in the wajib-ul-arz was the right one.

In *Angan Lal v. Hamidulnissa* (S. A. No. 1249 of 1892), the question was discussed in the judgment of Tyrrell and Blair, JJ., remitting certain issues on the 29th June 1894. The claim for pre-emption was based on the wajib-ul-arz of a mahal consisting of 12 biswas only of a mauza. In that mahal the plaintiff and the vendors were co-sharers. The wajib-ul-arz gave the right of pre-emption by contract to sharers (*sharkai*) in the mahal. There was a perfect partition by which the 12 biswas mahal was divided into four separate mahals. In one of these, in which the property in question was situate, there were several co-sharers, including the vendors, but not the plaintiff. Of another of the four, the plaintiff was the sole proprietor. No new wajib-ul-arz was framed. After the partition, the vendors sold some of the land in their new mahal to a stranger. The plaintiff sued for pre-emption on the basis of the old wajib-ul-arz. I think there can be no doubt that the suit was rightly dismissed. The plaintiff was not a *sharik* or sharer in the mahal, within the meaning of the wajib-ul-arz. The class of sharers in that mahal had ceased to exist with the mahal itself. The plaintiff was not even a *sharik* or sharer in the new mahal in which the property sold was situate. The Court distinguished *Gokal Singh v. Mannu Lal*, *Kuar Dat Prasad Singh v. Nahar Singh*, *Ramjiawan Sahu v. Raturaj Singh* and *Abbas Ali v. Ghulam Nabi*, on the grounds that in those cases the mauza and the mahal were originally conterminous; that in them the wajib-ul-arz gave rights of pre-emption not to co-sharers in the mahal but to shareholders in the mauza, and that therefore the right there survived the partition of the mahal into separate mahals for which no new wajib-ul-arzes were framed. In *Ghure v. Man Singh* (1), decided in 1895, the wajib-ul-arz of a village forming a single mahal gave the right of pre-emption to "*hissadaran deh*," the same expression as is used in

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(1) (1895) I. L. R., 17 All., 226.

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the wajib-ul-arz in the present case. There was a perfect partition of the village into three separate mahals, and for each mahal was framed a new wajib-ul-arz which gave no right of pre-emption to sharers in the other mahals. A suit for pre-emption based on the old wajib-ul-arz was brought by a co-sharer of one of the separate mahals to avoid a sale of land situate in another of them. Two questions arose. The first was whether the new wajib-ul-arz was prepared in accordance with law so as to govern the rights of the parties. The second was whether the old wajib-ul-arz was still operative, notwithstanding the partition, and whether the plaintiff was entitled to pre-emption under its provisions. Upon the first question, the Court held that the new wajib-ul-arz was a valid document, and that, as it gave the plaintiff no right of pre-emption, the suit failed. Upon the second they held that the plaintiff could not, after the partition, successfully claim pre-emption on the basis of the old wajib-ul-arz. In reference to the argument for the plaintiff based on the words "*hissadar deh*" Mr. Justice Knox made the following important observations:—

"We are dealing with a village which bears a Hindu name, the parties before us are Hindus, and the custom, if there be one, of pre-emption, in so far as it extends, is a custom superseding general law. In examining the terms in which it is recorded, we cannot forget that it was recorded at a time when the village bore its natural, and, from a Hindu standpoint, proper form of an undivided village and an undivided mahal. The term "*hissadar deh*" as then used would apply to all who could claim to hold a share in land within a well-defined ring-fence in which all were shareholders, and at a time when there existed no intention of the village brotherhood being separated or the land being broken up into distinct parcels, in which some only and not all the village brotherhood would hold a share. It is more than difficult to say that those who then made the record would have recorded that the custom was one which should prevail when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place."

The learned Judge proceeded to distinguish *Gokal Singh v. Mannu Lal, Mata Din v. Mahesh Prasad, Kuar Dat Prasad Singh v. Nahar Singh* and *Shiam Sundar v. Amanant Begam*, with reference to the special circumstances of those cases. He concluded as follows:—"The result then is that the document upon which the respondents base their right, and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed, and which never contemplated the existing state of things. We are not prepared to hold that it is sufficient to establish that the custom which did prevail, if there be such a custom, can be held to be a custom governing and ruling the parties in the new and altered state of things." Mr. Justice Aikman, after holding that the new *wajib-ul-arz* would supply a sufficient answer to the suit, expressly stated that this would be enough to decide the case. What follows is therefore *obiter*. He proceeded to discuss the question "whether after a partition an owner of land in one mahal can assert a right of pre-emption when a sale is made of property situated in another mahal." After observing that it had never been held that a right of pre-emption disappears with an *imperfect* partition, he referred to *Motee Sah v. Musammat Goklee* and *Jai Ram v. Mahabir Rai* in support of the view that "it is different in the case of perfect partition." He dissented from the decision in *Gokal Singh v. Mannu Lal* and expressed the opinion "that unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying in the other mahals, such right of pre-emption is not to be presumed from the mere fact that, when the village formed but one mahal, the co-sharers had pre-emptive rights against each other." I agree that there is no such presumption, but in deciding whether the right has been established the terms of the *wajib-ul-arz* and the state of things existing when it was framed, as well as that existing at that time of partition, must, I think, be considered. However, there is nothing in Mr. Justice Aikman's

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judgment to the contrary, and he expresses no disagreement with Mr. Justice Knox. The decision in that case was followed by Mr. Justice Aikman in *Abdul Aziz Khan v. Husen Ali* (1) and by Mr. Justice Knox in *Shah Bindraban Das v. Dani Ram* (S. A., No. 675 of 1897). The claim in the former case appears to have been based on custom. The judgment holds in substance that, after perfect partition, the benefit of a custom of pre-emption recorded in the old *wajib-ul-arz* as prevailing among the co-sharers of the undivided mahal could be claimed by a co-sharer of one of the separate mahals in respect of property situate therein, but not in respect of property situate in another mahal of which he was not a co-sharer. The reason of this distinction must be that in the former case, but not in the latter, the claim is made by a co-sharer of the vendor. In neither case, however, is it made by a co-sharer of the mahal, to which alone the *wajib-ul-arz* presumably referred. Whether the distinction was justified or not depends, in my opinion, upon the terms of the *wajib-ul-arz*. It would not, I think, be safe to assume that a custom prevailing among the co-sharers of mahal *A* would, after the destruction of that mahal and of the co-parcenary body connected with it, necessarily apply to the co-sharers of mahal *B* or mahal *C*, into which *A* has been partitioned. In this respect Mr. Justice Aikman's decision appears to be inconsistent with that of Mr. Justice Knox in *Shah Bindraban Das v. Dani Ram*, which, however, also purports to follow *Ghure v. Man Singh*. For in the case before Mr. Justice Knox, the claim for pre-emption based on the old *wajib-ul-arz* was made by a person who, after perfect partition, was a co-sharer of the vendor in one of the separate mahals. He claimed as coming within words which the Court of first instance translated as "co-sharers in the order of nearness, with regard to their holding shares in the village." No new *wajib-ul-arz* was framed. The vendees were admittedly strangers. Mr. Justice Knox confirmed the decree of the lower appellate Court dismissing the suit. His judgment treats *Ghure v. Man Singh* as not merely stating certain presumptions

(1) Weekly Notes, 1895, p. 233.

of fact or considerations as to what is probable in given circumstances, but as giving a general answer in the negative to the question "whether a wajib-ul-arz which was prepared at a time when the village out of which two separate mahals have now been carved by perfect partition, and for each of which separate mahals no wajib-ul-arz of any kind has been framed, governs the co-sharers in the two new mahals upon a question of the right of pre-emption based upon a covenant said to be contained in the old wajib-ul-arz." In *Abaul Hus v. Naim Singh* (1) the terms of the wajib-ul-arz do not appear from the report or from the paper-book. It appears, however, to have recorded a custom of pre-emption as prevailing in the undivided village. The village was divided by perfect partition into two mahals consisting respectively of 15 biswas and 5 biswas. No new wajib-ul-arz was framed. The whole 5 biswas mahal belonged to the defendant vendor, and he sold it to strangers. The owner of a share in the 15 biswas mahal only sued for pre-emption on the basis of the old wajib-ul-arz. The High Court on appeal dismissed the suit. The Judgment of Edge, C. J., and Blair, J., refers with approval to *Ghure v. Mun Singh* and *Angan Lal v. Hamid-ul-nissa*. The principle on which it is based is the improbability, having regard to the usual objects and motives of shareholders obtaining perfect partition of a mahal, that they should, after partition, intend that the other co-sharers from whom they had separated their interest should be entitled to come in and become again their co-sharers. The last reported case is *Mithu Lal v. Muhammad Ahmad Said Khan* (2) decided by Blair and Aikman, JJ. The suit was based on a pre-emption clause recording a custom of pre-emption in favour of "co-sharers in the village." The village, at the time when the wajib-ul-arz was framed, was an undivided mahal. By a perfect partition it was afterwards divided into two separate mahals of 15 and 5 biswas respectively. No new wajib-ul-arz was framed. The plaintiffs and the vendors were co-sharers in the 5 biswas mahal, in which the property was sold. The vendee

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(1) (1897) I. L. R., 20 All., 92.

(2) Weekly Notes, 1899, p. 19.

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was sole proprietor of the 15 biswas mahal, and his only connection with the other was that he owned in it certain rent-free land. His main defence to the suit was that the plaintiffs had no preferential right because he was himself a "co-sharer in the village" within the old wajib-ul-arz, notwithstanding the partition. The High Court held in substance (1) that the old wajib-ul-arz and the old custom still remained in force in so far as they were not inconsistent with the state of things created by the partition, (2) that as in consequence of the partition the defendant had ceased to be a "co-sharer in the village" with the vendor, and was not a co-sharer in the 5 biswas mahal, he had not equal rights with the plaintiffs, and (3) that the plaintiffs were entitled to pre-emption under the old wajib-ul-arz. So far as this decision rejected the defendant's claim to the right of pre-emption, I have no doubt that it was right. But what about the claim of the plaintiffs? The Court in decreeing the suit assumed that the plaintiffs, at all events, were entitled to pre-emption under the old wajib-ul-arz, notwithstanding the perfect partition. Apparently they assumed it because the plaintiffs were admittedly co-sharers with the vendor in the 5 biswas mahal in which the property sold was situate. In other words they took for granted that co-sharers in one of the separate mahals were "co-sharers in the village" within the meaning of the wajib-ul-arz. It is likely enough that they were right, but they do not discuss the question. All depends on what the wajib-ul-arz meant by "co-sharers in the village." If it included all persons who might thereafter be co-sharers in any part of the village, the decision was right. If it meant all persons who were co-sharers in the entire undivided village for which the wajib-ul-arz was framed, the decision was wrong, for the plaintiffs, after partition, were no more co-sharers of the village in that sense than the defendant vendee. As a matter of fact the only co-sharers in the village at the time when the wajib-ul-arz was framed were co-sharers of the undivided village.

In the present case the whole question is, in my opinion, whether a *hissadar* has transferred his share within the meaning

of the *wajib-ul-arz*, and whether the plaintiff is a *hissadar deh* within the fourth category of pre-emptors. Taking first the word *deh*, it is, I think, virtually equivalent to *mauza*. It means a village in the sense of a definite local area, the actual village, with the lands belonging to it: Wilson's Glossary of Judicial and Revenue Terms, p. 141, Elliott's Supplementary Glossary of Terms used in the North-Western Provinces, Vol. ii, p. 283. It does not mean a mahal, and has no necessary reference to the fiscal unit. So far I agree with the argument on behalf of the plaintiff. The next question is, what is a *hissadar* of the village? The learned pleader contended that *hissadar* did not here mean a "co-sharer" of a mahal in the sense in which that term is used in the Land Revenue Act, but merely "the holder of a share." He argued that if co-sharers, in the sense of persons owning shares in the mahal formed by the undivided village, had been intended, some such word would have been used as "*sharik-i-mahal*," the term used for co-sharers in the official vernacular translation of the Land Revenue Act, or else "*sharik-i-hissa*." He laid stress on the expression "*malikan sharik khata*" in the third category of pre-emptors mentioned in the *wajib-ul-arz* as indicating that, where jointness of interest was signified, the word "*sharik*" was employed. According to this argument, a *hissadar deh* merely means one who owns or holds a share within the area of the village. If that is the meaning, then, notwithstanding the partition, the plaintiff is entitled to pre-emption, for the *deh* or village still remains, and he is still a *hissadar*, or owner of a share, within its area. On the other hand, it was contended for the defendants that *hissadar* means not merely the owner of a share, but a "co-sharer," and that *hissadar deh* means a co-sharer of the entire village for which the *wajib-ul-arz* was framed. If that is the meaning, then, as the effect of the perfect partition was to destroy the class of *hissadاران deh* altogether, neither the plaintiff nor anyone else can now claim pre-emption as a member of it.

The result of the argument is, I think, to show that the word *hissadar* taken by itself, and without reference to any context,

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is ambiguous. In Wil-on's Glossary it is translated "a shareholder, a sharer, a co-parcener, one who pays his share of revenue to a zamindar or to the State." Mr. *Durga Charan* has pointed out in the written statement of one of the defendants and in the deposition of a witness instances of the description of persons as *hissadars* of the village Serui Sitam, though, since the partition, no one has been a co-sharer of the entire village. All depends, I think, upon the context. There are two main considerations which have led me to the conclusion that in this *wajib-ul-arz hissadar deh* means a co-sharer of the undivided village for which the *wajib-ul-arz* was framed. The first is that the word "*hissadar*" as used in the fourth category of pre-emptors must be construed in the same sense as the same word in the opening words of the clause "if any *hissadar* wishes to transfer his share (*apna hissa*)."¹ The word "*hissadar*" is there used without the word *deh*. Considering that a *wajib-ul-arz* is framed under the Land Revenue Act for a mahal, and that its chief purpose is to record the usages of co-sharers of the mahal in the sense of the Act, I think there is a strong presumption that the word "*hissadar*" when used in such a document means, in the absence of other expressions implying a different meaning, a co-sharer in that sense, a person jointly and severally responsible to Government for the revenue for the time being assessed on the entire mahal for which the *wajib-ul-arz* was framed, and, in cases of zamindari tenure, having a joint and undivided share in the whole of that mahal. The opening words of the clause mean therefore, in my opinion, "if any co-sharer of this mahal wishes to transfer his share therein." If so, the subsequent words "*hissadاران deh*" mean "co-sharers of the undivided village," not "owners of shares in any subdivision of the village." The second consideration is this. We are interpreting and applying a particular custom of which the plaintiff claims the benefit. In considering who is entitled to the benefit of a custom it is essential to see who are the persons among whom it has in fact habitually prevailed. It cannot be claimed by anyone

who is not a member of the class thus determined. Now there can be no doubt as to what was the class of persons who at the time when the *wajib-ul-arz* was framed, habitually exercised the right of pre-emption by virtue of the custom. They were the co-sharers of the undivided mahal which the village Serai Sitam then formed and no others. There was no distinction between shareholders in the village and co-sharers of the entire village; there was only a single class of co-sharers. That is the only class among whom the custom actually prevailed, and to whom therefore the right belonged. It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property sold. He is not a co-sharer of the entire village. He is not a member of the class who exercised the right of pre-emption at the time when the custom was recorded. He is a member of a class which only came into existence through the partition—persons who have shares in a particular sub-division of the village. He is not even a co-sharer of the vendor. To allow him to pre-empt under the old *wajib-ul-arz* would be, in my opinion, to change the custom while professing to apply it.

For these reasons I am of opinion that the sale which the suit seeks to avoid was not a transfer within the meaning of the *wajib-ul-arz*, that the plaintiff is not entitled to pre-emption as a *his-sadar deh*, and that his suit and this appeal must be dismissed with costs in all Courts.

KNOX, J.—I concur in all that the learned Chief Justice has written, and have nothing more to add.

BURKITT, J.—I am of the same opinion.

BANERJI, J.—I have arrived at the same conclusion as the learned Chief Justice.

A claim for pre-emption not founded on Muhammadan law must be based on custom, or contract, or both. A *wajib-ul-arz* in so far as it relates to pre-emption, is the record of the custom of pre-emption which prevails in the village or mahal, or of the contract by which the co-sharers have agreed to be bound:

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when therefore a *wajib-ul-arz* is referred to as the foundation of a claim for pre-emption, the real basis of the claim is the custom or contract which is evidenced by the *wajib-ul-arz*. Even if the *wajib-ul-arz* has become inoperative as a part of the record-of-rights, it does not necessarily follow that the custom or contract embodied in it has ceased, and that a suit cannot be brought upon the basis of such custom or contract. It seems to me that the conflict of opinion which arose in the numerous cases cited to us at the hearing and considered in detail by the learned Chief Justice was to a great extent due to the fact that in many of those cases the provisions of the *wajib-ul-arz* were treated as representing a contract between the co-sharers, whereas in fact they were, and professed to be, the record of a custom prevailing in the particular village or mahal. It was, I suppose, in consequence of this disregard of the exact nature of the claim that it was laid down in some of those cases that after a perfect partition has been effected a co-sharer in one mahal is not entitled to pre-empt property in another mahal "unless at the time of partition there has been some specific arrangement by which reciprocal rights of pre-emption have been maintained between the co-sharers of the different mahals." In my opinion the mere fact that a perfect partition has taken place does not abrogate a custom or contract as to pre-emption which was in force before partition. If after partition a new *wajib-ul-arz* has been prepared recording a custom or contract different from the custom or contract embodied in the old *wajib-ul-arz*, the presumption will be that the custom which obtained in the village or the mahal at the time of the preparation of the old *wajib-ul-arz* has fallen into desuetude, and a new custom has sprung up, or that the co-sharers have set aside the old contract and entered into a new one. But where a fresh *wajib-ul-arz* has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect and operation. As observed by the learned Chief Justice, the question in each case is that of the construction of the nature of the particular custom or

contract on which the claim for pre-emption is based, and whether the custom or contract can apply to the altered state of things which has come into existence since a perfect partition has been effected.

In the case before us the wajib-ul-arz which was referred to as the basis of the claim professes to be the record of a custom and not of a contract. What we have to consider is whether under that custom the plaintiff has a preferential right of pre-emption. It is admitted that the plaintiff does not belong to the first three classes of pre-emptors mentioned in the wajib-ul-arz, nor does he come under the fourth category. Since partition he has admittedly ceased to be a co-sharer of the vendor. He no doubt holds a share in the village. But, in my opinion, the true construction of the custom as recorded in the wajib-ul-arz is that it is only such a shareholder as is also a co-sharer who has the right of pre-emption as a pre-emptor of the fourth class. At the time when the wajib-ul-arz was prepared all the shareholders were also co-sharers. The custom which was embodied in the wajib-ul-arz evidently had reference to that description of shareholders. Therefore by virtue of such a custom the plaintiff, who is the holder of a share in the village, but not a co-sharer of the vendor, has no right of pre-emption and his suit has been properly dismissed. I would dismiss this appeal with costs.

AIKMAN, J.—The question raised in this appeal is whether, when no new wajib-ul-arz has been prepared on the perfect partition of a mahal, a claim for pre-emption can be maintained on the basis of the old wajib-ul-arz framed for the former mahal, which has by partition been broken up into two or more mahals. I agree with the learned Chief Justice in holding that it is incorrect to say that upon partition the former wajib-ul-arz necessarily disappears or ceases to exist. If a fresh wajib-ul-arz is prepared for each of the new mahals the old wajib-ul-arz is thereby superseded, but until this is done the old wajib-ul-arz must be considered as in force, but only so far as it is applicable to the altered state of things.

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The cases in this Court which held that, because, under a *wajib-ul-arz* in force before partition there had been a right of pre-emption amongst those who were then co-sharers of the village, the same right subsisted after partition amongst those who owned shares in the different *mahals* of the village, lost sight, it appears to me, of the material alteration in the circumstances brought about by the partition.

Where the *wajib-ul-arz* of an undivided *mahal*, whether reciting a custom or embodying a contract, lays down that a right of pre-emption prevails amongst the "shareholders" of the *mahal*, it refers to a body of men between whom there is this common bond that they each own a fractional share of an integer made up of all the shares held by each, in virtue of which ownership they incur reciprocal liabilities and are entitled to reciprocal rights. When this common bond has disappeared it cannot be assumed that the reciprocal rights and liabilities which formerly existed are still in force. Where the old *wajib-ul-arz* recites the existence of a custom amongst a body of men between whom a common link subsists, I do not see how, after a perfect partition, it can reasonably be held that the custom continues to prevail amongst those between whom that common link is no longer in existence. Where, however, the *wajib-ul-arz* embodies a contract, I concur with the learned Chief Justice in holding that the question whether, in the altered state of things, the contract is still in force, must depend on the language of the old *wajib-ul-arz*. It is quite conceivable that the old *wajib-ul-arz* might set forth an express agreement that no future partition would destroy existing rights of pre-emption. But where there is no such express contract, and the old *wajib-ul-arz* merely records a right of pre-emption as existing by way of a contract amongst those who are *hissadars* of the village, the inference is that the language of the *wajib-ul-arz* refers to persons who stand to one another in the mutual relation of owning shares in the same integer.

In the present case the claim of the plaintiff was based on a clause in the *wajib-ul-arz* which occurs in a chapter dealing with

the rights of co-sharers amongst themselves. According to this clause a *hissadar* could not sell his share to an outsider until he had first offered it to the other shareholders in the village (*hissadaran deh*). This was the record of a custom. From the language used, the inference I draw is that the custom was one which prevailed amongst those who each owned a fractional share or *hissa* of one undivided estate, and cannot be held to subsist amongst those between whom there is now no such common bond. To use the words of Oldfield, J.:—"The condition of pre-emption only affected the shareholders of the mahal as long as they remained shareholders, and ceased to have effect on those shareholders and their property who separated themselves and their property by forming a separate mahal" (1). The plaintiff in this case owns no property in the mahal in which the share sold is situated, and cannot therefore be held to be standing in the relation of *hissadar* to the *hissadar* who has sold.

For these reasons I think the plaintiff's suit was properly dismissed by our brother Blair, and I would dismiss this appeal with costs.

Appeal dismissed.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knor, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

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Hindu law—Reversioners—Suit to set aside alienation by Hindu widow—Similar suit barred by limitation as against a prior reversioner—Suit by subsequent reversioner not thereby barred—Limitation—Act No. XV of 1877 (Indian Limitation Act), section 7; sch. ii, Art. 120.

Held that, where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one such reversioner can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being

* Second Appeal No. 879 of 1896, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 13th July 1896, confirming a decree of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 23rd April 1896.

(1) (1885) I. L. R., 7 All., 720; at p. 730.

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to contest an alienation or an adoption by the widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioners. *Ben Prasad v Hardai Bibi* (1), *Ramphal Rai v Tula Kuari* (2), *Jumona Dassya Chowdhurani v Bamasoonderei Dassya Chowdhurani* (3) and *Isri Dut Koer v Mussumat Hansbutti Koerain* (4) referred to. *Chhaganram Astikram v. Bai Motigauri* (5) and *Pershad Singh v. Chedee Lall* (6) dissented from.

A minor plaintiff instituting a suit which falls within article 120 of the second schedule of the Indian Limitation Act, 1877, is not excluded from the benefit of section 7 merely because the right of some other person through whom he does not claim to sue for similar relief has become time barred. The "right to sue" mentioned in the third column of Article 120 means the right to sue of the plaintiff or of some one through whom he claims. The "period of limitation" mentioned in section 7 means the period of limitation for the suit which the plaintiff or some one through whom he claims is entitled to institute. *Siddhessur Dutt v Sham Chand Nundun* (7), *Mrino Moyee Debia v. Bhobun Moyee Debia* (8), *Gobind Coomar Chowdhury v. Huro Chunder Chowdhury* (9) and *Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar* (10) referred to.

THIS was a suit by certain plaintiffs, who claimed, as reversioners under the Hindu law, to get rid of the effect, as against their interests, of certain alienations of property which had been of their maternal grandfather, Richpal, in his lifetime. The plaintiffs asked for a declaration, first, that an alienation made in 1876, by a Hindu widow, their maternal grandmother, Sabej Kunwar, in favour of one Musammat Hanso, was void as against the plaintiffs; secondly, that a further alienation made by Musammat Hanso in 1893 to one Kirpa Ram was also void as against the plaintiffs; thirdly, that the plaintiffs were entitled, after the death of their mother, Musammat Mattra, to possession of the property in suit. At the time of the alienation in 1876 by Sabej Kunwar, the plaintiff's mother, Musammat Mattra, was the nearest living reversioner. She became entitled to possession of the property in 1880, when her mother, the widow Sabej Kunwar, died: she took no steps to

(1) F. A. No. 35 of 1868, decided February 4th 1892.

(2) (1883) I. L. R., 6 All., 116.

(3) (1876) L. R., 3 I. A., 72.

(4) (1883) L. R., 10 I. A., 150; S. C., I. L. R., 10 Calc., 324.

(5) (1890) I. L. R., 14 Bom., 512.

(6) (1871) 15 W. R., C. R., 1.

(7) (1875) 23 W. R., C. R., 285.

(8) (1874) 23 W. R., C. R., 42.

(9) 1866) 7 W. R., C. R., 134.

(10) (1869) 2 B. L. R., A. I. C., 313.

question the alienation made in 1876. She was made a *pro forma* defendant to the suit, and in her written statement she pleaded that she did not wish to question either the alienation of 1876 or that of 1893. The suit was brought in 1894, all the plaintiffs being then minors, represented, for the purposes of the suit, by their father, Jewa Ram, as guardian *ad litem*.

The Court of first instance (Subordinate Judge of Agra), dismissed the suit as barred by limitation, holding that limitation began to run from the date of the alienation by Subej Kunwar in 1876, and that the case was governed either by Article 120 or by Article 125 of the second schedule to the Indian Limitation Act, 1877. The plaintiffs appealed and the lower appellate Court (District Judge of Agra) dismissed their appeal, holding the suit to be barred by either Article 120 or Article 126. The plaintiffs appealed to the High Court.

Pandit *Baldeo Ram Dave*, for the appellants.

Article 125 of the Indian Limitation Act, 1877, is not applicable to this suit. That Article is applicable to a suit brought during the life-time of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to have an alienation of land made by such female declared to be void except for her life. In the present case, the female who made the alienation was dead before the institution of the suit. It has not been brought by a person who was entitled to possession immediately after the death of that female. The appellant's mother, Musamat Matta, is still alive, and she is the person entitled to immediate possession. She is a defendant to this suit. There is no Article in the Limitation Act applicable to a suit of this class. Article 126, referred to by the Court of first instance, has no bearing on the question. Article 120 of the second schedule to the Act has been held by this Court to apply to suits for declaratory decrees—*Legge v. Ram Baran* (1). Under it a period of six years is provided, and the time from which it

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(1) (1897) I. L. R., 20 ALL., 35.

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begins to run is "when the right to sue accrues." The right to impeach an alienation made by a Hindu widow having a limited interest belongs to the presumptive reversionary heir—*Rani Anund Koer v. The Court of Wards* (1). The present plaintiffs have no right to sue for the declaration sought by them during the lifetime of their mother, who is the presumptive reversionary heir, unless they show that their mother has refused to sue without any sufficient cause, or has precluded herself by her own act or conduct from suing, or has colluded with the widow or concurred in the act which we say is wrongful—*Rani Anund Koer v. The Court of Wards* (1). We allege facts to that effect in the 8th paragraph of our plaint. So long as Sabej Kunwar was alive, the transferees had a right to be in possession of the property alienated to them, and Musammat Mattra could have abstained from taking any steps to impeach the alienation. But the moment she was dead, Musammat Mattra ought not to have allowed the alienees to remain in possession of that property to the prejudice of the plaintiff's right. If the plaintiff's allegations be true, the alienees become trespassers on the death of Musammat Sabej Kunwar. It is the conduct of Musammat Mattra, on the death of Musammat Sabej Kunwar, which gave the plaintiff a right to sue. The suit is within six years of the date of Musammat Sabej Kunwar's death. There is only one case of this Court, in which Mahmood, J., has ruled that a daughter's son could, during the life-time of his mother, maintain a suit to impeach an alienation made by his maternal grandmother without proof of collusion or other circumstances on the part of the daughter—*Balgobind v. Ram Kumar* (2). Oldfield, J., who was one of the Judges who decided that case, held that the suit was maintainable as one coming within the exceptional circumstances under which a daughter's son could maintain such an action. The view of Mahmood, J., has been based on the doctrines of the English law concerning life estates, whilst the estate of a Hindu widow inheriting from her

(1) (1880) L. R., 8 I.A., 14; S. C.,
I. L. R., 6 Calc., 764.

(2) (1884) I. L. R., 6 All., 431

husband is not, strictly speaking, what a life estate is under the English law—Tagore Law Lectures for 1879, pp. 239—245. The view of Mahmood, J., is in direct conflict with the ruling in *Madari v. Malki* (1), decided by Straight, Officiating C. J., and Brodhurst, J. Following the latter ruling, Tyrrell and Blair, JJ., have in *Ishwar Narain v. Janki* (2) expressly dissented from the ruling of Mr. Justice Mahmood. That ruling is also opposed to the principles laid down in *Musammatt Golab Koonwer v. Shib Sahai* (3), *Radha Kishen v. Bukhtawur Lal* (4), *Bal Gobind Ram v. Hirusranee* (5), and *Bama Soonduree Dossee v. Bama Soonduree Dossee* (6). In *Kandasami v. Akkammal* (7) and in *Raghupati v. Tirumalai* (8), the Madras High Court seems to have taken the same view as Mahmood, J., has in *Bal Gobind v. Ram Kumar* (9). But the weight of authority appears to be in favour of the plaintiff's case.

The ruling of the Bombay High Court in *Ohhaganram Astikram v. Bai Motigavri* (10) has no application to a case governed by the Mitakshara law. In the Bombay case, to which the Mayukha law was applicable, the daughter took a full estate, and the daughter's son inherited to his mother. Under the Mitakshara law, a daughter takes only a widow's estate in the property left by her father, and a daughter's son inherits to his maternal grandfather. The case of *Pershad Singh v. Chedee Lall* (11), relied on by the Court below, has been decided on a misconception of the principle that under the Mitakshara law a daughter's son does not inherit to his mother but to the maternal grandfather in respect of the property left by him. In order to substantiate the proposition that the plaintiff's suit was barred by limitation, because a right to sue for a declaration had accrued to Musammatt Mattra in 1876, it must be shown that the plaintiffs derived their right to sue from or through Musammatt Mattra.

(1) (1884) I. L. R., 6 All., 428.

(6) (1868) 10 W. R., C. R., 301.

(2) (1893) I. L. R., 15 All., 132.

(7) (1889) I. L. R., 18 Mad., 195.

(3) (1867) N.-W. P., H. C. Rep., 1867, p. 54.

(8) (1892) I. L. R., 15 Mad., 422.

(4) (1866) N.-W. P., H. C. Rep., 1866, p. 1.

(9) (1884) I. L. R., 6 All., 431.

(5) (1865) 2 W. R., C. R., 255.

(10) (1890) I. L. R., 14 Bom., 512.

(11) (1871) 15 W. R., C. R., 1.

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[Definition of the word "plaintiff" in section 3 of the Indian Limitation Act.]

Any act or omission on the part of Musammât Mattra cannot be prejudicial to the right of the plaintiffs by way of *res judicata* or estoppel—*Isri Dut Koer v. Mussumat Hansbutti Koerain* (1). Mahmood, J., sitting with Young, J., has fully considered this question in the case of *Beni Prasad v. Hardai Bibi* in an unreported judgment which was delivered on a preliminary point before the appeal was referred to the Full Bench [F. A. No. 35 of 1888]; and has held that a suit under similar circumstances was not barred by any rule of limitation.

I further contend that as the plaintiffs were minors at the time of the institution of this suit, and as they do not derive their right to sue from, or through, any person to whom a right to sue might have accrued, the suit is not barred by limitation. The plaintiffs can claim the benefit of section 7 of the Indian Limitation Act, 1877, even if they sue through their next friend—*Mussumat Phoolbas Koonwur v. Lulla Jogeshur Sahay* (2).

Munshi Gulzari Lal for the respondents.

Article 125 of the Limitation Act is applicable to this suit. Although the present suit has been brought after the death of the female making the alienation, the prayer of the plaintiffs is that all alienations should be declared ineffectual. They could have sought for this declaration in the life-time of Sabej Kunwar, and should have done so within six years of the alienation of 1876. Not having done so, their remedy is barred. Such a suit would lie even during the lifetime of Musammât Mattra, who has only a life estate like that of her mother, Musammât Sabej Kunwar—*Bal Gobind v. Ram Kumar* (3). This ruling has been followed by the Madras High Court in *Raghupati v. Tirumalai* (4), and to the same effect is the ruling in *Kandasami v. Akkammal* (5). The judgment of Mahmood, J., in *Bal Gobind v. Ram Kumar* (3),

(1) (1883) L. R., 10 I. A., 150; S. C.,
I. L. R., 10 Cal., 324.¹

* (2) (1875) L. R., 3 I. A., 7; S. C., I.
L. R., 1 Cal., 226.

(3) (1884) I. L. R., 6 All., 431.

(4) (1892) I. L. R., 15 Mad., 422.

(5) (1889) I. L. R., 13 Mad., 195.

sets out fully the reasons for his conclusions. Even if Musammat Mattra was entitled to sue in preference to the plaintiffs, she not having availed herself of her remedy, the plaintiff's suit would be barred on the authority of *Chhaganram Astikram v. Bai Motigavri* (1). That case was not decided upon any special doctrine of the Hindu law under the *Miyukha*, but was decided upon the authority of the case of *Pershad Singh v. Chedee Lall* (2), which has been relied on by the plaintiff. Under the circumstances the plaintiff's suit is barred by limitation. As to the application of section 7 of the Limitation Act, I say that that section does not apply if the suit is by a guardian. The ruling of the Privy Council was decided under the old Limitation Act, which has been repealed. The word "plaintiff" has not been used in section 7 of the Act or in Article 120 of the schedule. The definition of that word in section 3 has no application.

[The case was again put up at a subsequent date for further argument with reference to the principle enunciated in the case of *Siddhessur Dutt v. Sham Chand Nundun* (3)].

On this point Pandit *Baldeo Ram Dave* for the appellants—

In the case of *Siddhessur Dutt v. Sham Chand Nundun* (3), the suit was one to set aside an adoption and was governed by Article 129 of the Indian Limitation Act of 1871. Under that Article, which has now been replaced by Article 118 of the present Act, the period of limitation began to run from "the date of the adoption, or (at the option of the plaintiff), the death of the adoptive father." There a particular date was fixed and the period of limitation began to run from that date. No subsequent disability or inability to sue could stop it. But the Article applicable to the present suit is Article 120 of the Limitation Act of 1877, which provides 6 years from the date "when the right to sue accrues," that is, when the right to sue accrues to the "plaintiff" as defined in section 3 of the Act. As the plaintiffs in this case do not derive their right to sue from or through any person, but they sue

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(1) (1890) I. L. R., 14 Bom., 512. (2) (1871) 15 W. R., C. R., 1.

(3) (1875) 23 W. R., C. R., 285.

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in their own right, no right to sue could accrue to them before their birth. No cause of action can exist "unless there be also a person in existence capable of suing"—*Murray v. The East India Company* (1). As the right to sue did not accrue to the plaintiffs before their birth, no period of limitation could begin to run prior to their birth. As the plaintiffs were minors at the time of the institution of this suit, they could avail themselves of the provisions of section 7 of the Indian Limitation Act, 1877, and present suit was not barred by limitation.

Munshi Gulzar Lal contra:

I rely on the terms of section 7 of the Limitation Act, according to which the plaintiff must be in existence at the time from which the period of limitation is to begin, to enable him to avail himself of the provisions of that section. In this suit the plaintiffs were not in existence. In support of this I also rely upon *Siddhessur Dutt v. Sham Chand Nundun* (2), *Mirno Moyee Debia v. Bhoobun Moyee Debia* (3), *Gobind Coomar Chowdhry v. Huro Chunder Chowdhry* (4), and *Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar* (5).

These authorities have not been overruled by any subsequent decisions. The change in the terms of section 7 of the present Act does not alter the law. We have now the words "the right to sue" in Article 120, which is applicable to this suit, instead of in section 7 of the Act.

STRACHEY, C. J.—The only question which we have to consider is whether the Court below has rightly dismissed this suit as barred by limitation. The suit was brought for a declaration, first, that an alienation made in 1876 by a Hindu widow, the plaintiffs' maternal grandmother Sabej Kunwar, in favour of Musammat Hanso was void as against the plaintiffs; secondly, that a further alienation made by Hanso in 1893 to Kirpa Ram was also void as against the plaintiffs; thirdly, that the plaintiffs

(1) (1821) 5 Barn. and Ald., 204;

S. C., 24 R. R., 325.

(2) (1875) 23 W. R., C. R., 285

(3) (1874) 23 W. R., C. R., 42.

(4) (1866) 7 W. R., C. R., 184.

(5) (1869) 2 B. L. R., 313.

are entitled after the death of their mother Musammat Mattra to possession of the property in suit. At the time of the alienation of 1876 by Sabej Kunwar, the plaintiff's mother Musammat Mattra was the nearest living reversioner. She became entitled to possession of the property in 1889, when her mother, the widow Sabej Kunwar, died. She took no steps to question the alienation made in 1876. She has been made a *pro forma* defendant to this suit, and in her written statement she pleads that she does not wish to question either the alienation of 1876 or that of 1893.

Several questions have been discussed, which, in the view we now take of the case, it is not necessary to consider further, such for instance, as whether the plaintiffs could during the life-time of Sabej Kunwar have sued for a declaration in respect of the alienation of 1876, their mother Musammat Mattra being then the nearest reversioner, though having only an estate similar in nature and extent to that of the widow, and whether on the death of Sabej Kunwar in 1889, or on the further transfer made by Hanso to Kirpa Ram in 1893, any fresh cause of action for a declaratory suit accrued to the plaintiffs. As I have said, the only question which it is necessary to consider is whether this suit is barred by limitation.

Admittedly during the life-time of Musammat Mattra all that the plaintiffs can claim is declaratory relief in respect of these alienations. It is clear that the suit does not fall within article 125 of the second schedule of the Limitation Act, which refers only to suits brought during the life-time of the widow whose alienation is impeached. That article could not apply to the suit as regards the transfer made by Sabej Kunwar, who died in 1889. The only article applicable to the suit is article 120 which prescribes a period of six years from the time when the right to sue accrues. A right to sue for a declaration impugning the alienation of 1876, accrued to Musammat Mattra at the date of that alienation, and, having regard to article 125, became barred in the year 1888, in the absence of any special circumstance extending the limitation period. The right of the present plaintiffs, the sons of Musammat

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Mattra, to impugn that alienation accrued on one view of the law at their birth, and on another view of the law when, by the death of Sabej Kunwar in 1889, they first occupied the position of next reversioners to the estate. It is, however, admitted that all the present plaintiffs were minors at the date of the institution of the suit which they brought in February 1894. They claim the benefit of section 7 of the Limitation Act, which has been held by the Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy* (1), to apply not only after the disability of minority has ceased, but during its continuance, to suits brought on behalf of the minor by his next friend; so that in any view it would appear that, having regard to section 7, the suit cannot be defeated on the ground of limitation.

It has, however, been argued that section 7 pre-supposes a right to sue in existence at the time of the institution of the suit, and that the fact that a suit by Musammat Mattra was long ago time-barred would operate as a bar to the plaintiffs, even though they are minors and notwithstanding section 7. In support of that contention the case of *Chhaganram Astikram v. Bai Motigavri* (2), has been cited. There the mother of the plaintiffs was originally the nearest reversioner. There was a sale of the property in suit in execution of a decree against the widow for a debt due by her husband, and in consequence the widow was dispossessed in 1869. The nearest reversioner, the plaintiff's mother, died in 1879. In 1883, the plaintiffs sued as reversioners, the widow being still alive, for a declaration that they were not bound by the sale, that the decree in execution of which the property was sold was collusive and fraudulent, and that they were entitled to the property on the widow's death. One of the plaintiffs was a minor up to the year 1881. The other was still a minor in 1883, when the suit was brought. It was held that all right to sue for a declaration in respect of the sale and dispossession of the widow was barred in 1875, that is, when both the plaintiffs were minors, under article 120 of the second schedule of the Limitation

(1) (1875) L. R., 3 I. A., 7, S. C.,
 I. L. R., 1 Calc., 226.

(2) (1890) I. L. R., 14 Bom., 512.

Act. The ground of the decision is thus stated at p. 515 of the report :—"Cause of action having, therefore, been given to the plaintiffs' mother both by the sale and dispossession, no new cause of action can be held to have remained to the plaintiffs on their mother's death. It could not have been the intention of the Legislature, in giving a right to sue for a declaration within six years from the accrual of the right, to give successive rights to a series of successive reversioners to harass the alienees of an estate with repeated suits in respect of the same alienation. It has been held that when the widow dies, a new right of action (for possession) will be given to the reversioner then living, but, till then, at any rate, any right to seek a declaration possessed by any reversioner whose title to sue had accrued after the alienation must be regarded as derived from the person who was the heir-presumptive at the time of the alienation." Now, it is quite clear that such a reversioner does not in fact derive his title from the person who was the heir-presumptive at the time of the alienation. The judgment seems to me in effect to hold that although one reversioner does not derive his title from another and nearer reversioner, he must be deemed to do so in order to avoid the consequence of the alienees of the estate being harassed by a multiplicity of suits. The reversioner derives his title, not from any other reversioner but from the last full owner of the estate, and I can see no justification for introducing a fiction to the contrary effect merely to avoid a result which the Court may consider inexpedient. That judgment, having regard to the passage which I have just read, does not depend, as was suggested to us in argument, upon any special view entertained in Bombay as to the position in Hindu law of a daughter as being a full owner of the estate through whom the plaintiffs, in that case her sons, might have been held to claim. It follows a judgment of the Calcutta High Court in *Pershad Singh v. Chedee Lall* (1). In that case a Hindu widow was sued for acts of waste and alienation alleged to have taken place during the

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lives of the mothers of the plaintiffs who were, when those acts were committed, the next heirs to the property. "At the time when the alienation complained of occurred, the mothers of the plaintiffs were alive and were then the next heirs entitled to this property, and they might have brought the suit which the plaintiffs have now brought, but they did not do so. They allowed more than 12 years to elapse, and this cause of action is not revived in favour of the plaintiffs who have since been born and have now arrived at majority." That is to say, the plaintiffs' right of suit was held barred by the omission of their mothers to sue, through whom they did not claim, and it was assumed that the cause of action accruing to the plaintiffs' mothers and the cause of action on which the plaintiffs themselves came into Court were one and the same, so that what barred the mothers would equally bar the sons. We have very carefully considered these two cases. It appears to me that they are contrary to well recognized principles, and that we ought not to follow them. If the nearest reversioner could be held, as the Hindu widow has been held, to represent fully the whole estate, it would no doubt follow that the limitation which would bar that reversioner would bar other reversioners, just as a decree passed against the nearest reversioner would, in that case, operate as *res judicata* against the more remote. But so far as I know, that has never been held to be the relation in which one reversioner stands to another, and we are not, I think, at liberty to act on an incorrect view of that relation in order to achieve the desirable result of preventing multiplicity of suits. A similar question has been considered with great fulness and care by Mr. Justice Mahmood in an unreported case—*Beni Prasad v. Hardai Bibi*.* That case has recently been decided by the Privy Council in connection with the validity in Hindu law of the adoption of an only son; but the question of limitation was apparently not raised by the defendants before the Privy Council; it was disposed of by Mr. Justice Mahmood and Mr. Justice Young as a preliminary point in the appeal before them.

* F. A. No. 35 of 1888, decided 4th February 1892.

In that case there was an adoption by a Hindu widow in 1858. At that time the nearest reversioner was one Kedar Nath. He died in 1881, a declaratory suit to impugn the adoption being then barred so far as he was concerned by article 118 of the Limitation Act. The plaintiff was the son of Kedar Nath. He was born in 1852, but until he became, on Kedar Nath's death in 1881, the nearest reversioner, he could not have brought a declaratory suit to impugn the adoption. He brought such a suit in 1886, it was found, within six years from the date on which he acquired knowledge of the adoption. So far it was clear that the suit was within limitation. But it was argued that as a suit by Kedar Nath when he was the next reversioner became barred by limitation long before his death in 1881, on which the plaintiff acquired his right to sue, the plaintiff's suit was also barred. Mr. Justice Mahmood held, with the concurrence of Mr. Justice Young, first that one reversioner cannot be held to claim through or to derive his title from another, even if that other happens to be his father, but derives his title from the last full owner; secondly, that the limitation which barred a suit by the nearest reversioner for the time being to contest an alienation or an adoption by a Hindu widow, would not bar a similar suit brought by another person after he became the nearest reversioner. At p. 160 of the paper book in that case Mr. Justice Mahmood thus sums up his elaborate consideration of the question:—"I think it is quite clear from what I have said that there is no authority, and there can be no reason in juristic principle for maintaining the proposition that the reversionary right under the Hindu law is a kind of heritable estate which descends from the father to the son, maintaining a kind of privity of blood for purposes of estoppel, the plea of *res judicata*, or the bar by limitation." Again at p. 161, after referring to the ruling of the Full Bench in *Ramphal Rai v. Tula Kuari* (1), he said:—"Applying the principle of that case together with that I have said as to the nature of reversionary right under the Hindu law, I hold that the circumstance

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that the plaintiff's father Kedar Nath, whilst being the nearest reversioner, had allowed the period of limitation for such a suit to elapse during his life-time, does not operate as barring the plaintiff's present suit by limitation." In support of his conclusion Mr. Justice Mahmood refers by way of analogy to the judgment of the Privy Council in *Jumona Dassya Chowdhurani v. Bamasoonderai Dassya Chowdhurani* (1), where their Lordships expressed a doubt as to whether a decree in favour of an adoption passed in a suit by a reversioner to set aside the adoption is binding upon any reversioner except the plaintiff, and whether a decision in such a suit adverse to the adoption would bind the adoptive son as between himself and any other than the plaintiff. In a later Privy Council case not referred to by Mr. Justice Mahmood, *Isri Dul Koor v. Mussumat Hansbutti Koerain* (2), their Lordships (at p. 157 of the report) indicate strongly that such a decision would not be binding as *res judicata* in the case of a new reversioner.

It was further argued that, having regard to the terms of section 7 of the Limitation Act, a plaintiff, to be entitled to the benefit of that section, must have been in existence and under disability at the time from which the period of limitation commences, and that therefore a minor cannot avail himself of the section in respect of a right of suit which came into existence before his birth. That contention in effect seeks to apply to the case the principle of section 9, that "when once time has begun to run, no subsequent disability or inability to sue stops it." In support of that contention the following cases were cited:—*Siddhessur Dutt v. Sham Chand Nundun* (3), *Mrino Moyee Debia v. Bhoobun Moyee Debia* (4), *Gobind Coomarr Chowdhry v. Huro Chunder Chowdhry* (5) and *Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar* (6). None of those cases were decided with reference to the present Limitation Act, and in none of them was the suit of the exact description of

(1) (1876) L. R., 3 I. A., 72.

(2) (1883) L. R., 10 I. A., 150.

(3) (1875) 23 W. R., C. R., 285.

(4) (1874) 23 W. R., C. R., 42.

(5) (1866) 7 W. R., C. R., 134.

(6) (1869) 2 B. L. R., 313.

that now before us. None of them, so far as I am aware, have been applied to suits brought since Act No. XV of 1877 came into force for a declaration impugning the validity of an alienation made by a Hindu widow. They are cases of suits to set aside an adoption falling under article 129 of Act IX of 1871, which article has been replaced by the totally different provisions of article 118 of the present Act. Instead of straining the language of these decisions to meet a case of this kind, it appears to me to be safer to look to the precise terms of the provisions applicable to this present case, *i.e.*, article 120 of the second schedule and section 7. As regards article 120, when the Legislature said that a suit may be brought six years from the time when the right to sue accrues, I think it clearly meant the right to sue of the plaintiff himself or some one through whom he claims, not a right of somebody else to sue through whom the plaintiff does not claim. The Legislature cannot have meant a right of anybody to sue, a right at large of some person wholly unconnected with the plaintiff. Similarly, if section 7 is read giving the terms used their ordinary and natural signification, I think the expression "the period of limitation" means the period of limitation for the plaintiff's suit, the period of limitation for the suit which the person under disability or some one through whom he claims is entitled to institute, not the period of limitation for a similar suit which some other person may have been entitled to institute. In my opinion nothing has occurred to deprive the plaintiffs, who are still minors, of the benefit of section 7 by extinguishing or barring their right to sue for a declaration in respect of the alienations of 1876 and 1893. I am therefore of opinion that the Court below ought not to have dismissed the suit as barred by limitation, but should have disposed of it on the merits. I think that the proper course is to allow this appeal, set aside the decree of the Court below, and remand the case to the Court of first instance for disposal on the merits. The plaintiffs are entitled to their costs of this appeal. The other costs will abide the result,

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KNOX, J.—I also agree that the plea of limitation should not have been allowed, and concur in the order proposed by the learned Chief Justice.

BLAIR, J.—I concur in the order proposed by the learned Chief Justice and the reasons by which that order is supported.

BANERJI, J.—I have arrived at the same conclusion as the learned Chief Justice. The lower appellate Court dismissed the suit as barred by limitation under article 125 of the second schedule of the Indian Limitation Act, 1877. As the suit was not one to set aside an alienation during the lifetime of the Hindu female who made the alienation, that article clearly did not apply. There being no other provision of the Limitation Act applicable to a suit of the kind brought by the plaintiffs, it was governed by article 120, which prescribes a limitation of six years, calculated from the date on which the right to sue accrued. I am of opinion that the right therein referred to is clearly the right of the plaintiff as defined in section 3 of the Act, and that the article does not refer to the right of a person other than the plaintiff. In the present case the right of the plaintiffs to question the alienation made by Sabej Kunwar could arise at the earliest on their birth. During the whole of the period subsequent to their birth they have been under a disability, and consequently they are entitled to the privilege which is accorded to plaintiffs of that description by section 7 of the Act. The rulings of the Calcutta High Court on which the learned vakil for the respondents has relied, and which are referred to in detail in the judgment of the learned Chief Justice, had reference to suits of a particular description and were based on the peculiar phraseology of the Limitation Act applicable to those suits. I am unable to hold that by reason of their not being in existence at the date of the alienation in question, the plaintiffs are not entitled to bring their suit at any time during the period of their minority, after the accrual of their right of suit. As regards the only other contention which was raised in this case, namely whether the fact of the omission of the plaintiff's

mother to question the alienation made by Sabej Kunwar barred the plaintiffs from maintaining the present suit, and the rulings by which that contention was sought to be supported, it is sufficient to say that those rulings evidently proceed upon the assumption that one reversioner derives title from another. I am unable to hold that that is a true proposition under the Hindu law. There is no privity of estate between one reversioner and another *qua* reversioners; therefore the act or omission of one reversioner cannot bind another, on the general principle that no one can be bound by the act or omission of a person through whom he does not derive title. For these reasons I agree in the order proposed by the learned Chief Justice.

BURKITT, J.—I have arrived at the same conclusion. In my opinion no cause of action for the present suit accrued before these plaintiffs' birth, and therefore it cannot possibly be barred by any limitation.

AIKMAN, J.—I concur in the judgments of the learned Chief Justice and my brother Banerji, and in the order proposed.

Appeal decreed and cause remanded.

PRIVY COUNCIL.

IN THE MATTER OF RAJENDRO NATH MUKERJI.

On appeal from the High Court for the North-Western Provinces.

Para. 8 of the Letters Patent, 1866—Removal of a vakil from the roll for reasonable cause—A conviction under section 471, Indian Penal Code.

A vakil of the High Court was convicted, under section 471 of the Indian Penal Code of fraudulently using as genuine a document which he knew to be forged. This was affirmed on appeal, when the punishment to which he had been sentenced was reduced to two years.

The High Court, while not allowing the propriety of the conviction and sentence to be questioned, had considered whether his culpability was such as to disqualify him for his profession, and had decided in the affirmative, removing him from the roll, under para. 8 of the Letters Patent, 1866.

Held, that, in the present case, the conviction, followed by the sentence, was sufficient, without further inquiry, to justify the High Court in making that order. The appellant could not be allowed to have an indirect appeal

Present:—LORD HOBHOUSE, LORD MACNAGHTEN and SIR RICHARD COCKBURN.

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against the judgment of the Sessions Judge confirmed by the High Court. The judgment of Lord Minsfield in *ex parte Brounsall* (1) referred to as well explaining the disqualification of a member of the legal profession that attends such a conviction and sentence.

In re Weare (2), where the Court of Appeal looked to see what was the nature of the offence and would not, as a matter of course, strike a solicitor off the roll because he had been convicted, distinguished from the present case.

In re Durga Charan (3), dealt with under section 12 of Act XVIII of 1879,* referred to as a case where the nature of the offence admitted of further inquiry and also distinguished.

In regard to the finality of the judgment of the High Court in deciding the appeal from the conviction and sentence, *In re the petition of Macrea* (4) was referred to.

APPEAL from an order (4th January 1896) of the High Court (5) in the matter of a vakil of the Court.

The appellant was enrolled as a vakil on the 8th April 1885, and practised till 1895. On the 9th August 1895 he was convicted at the Sessions, at Allahabad, of an offence under section 471 of the Indian Penal Code and was sentenced to a term of rigorous imprisonment for three years. On the 1st November 1895 his appeal was dismissed by the High Court with a reduction of the sentence to two years. The ground of his conviction was the making use of an official copy, filed by him in the High Court, for the purpose of presenting an appeal from a decree of the Saharanpur District Court, in which copy, as he knew, the date had been fraudulently altered, to make it appear that the appeal was not time-barred, as in fact it was.

A question now raised on this appeal was whether the conviction and the sentence of the Sessions Court, affirmed by the Court of Criminal appeal, sufficiently established the unfitness of a vakil to belong to the legal profession, forming a reasonable cause for his exclusion under para. 8 of the Letters Patent, or there should be further consideration of the degree of his culpability as affecting the justice of his removal or suspension from practice.

(1) (1778) 2 Cowper's Rep. 829.

(2) (1893) L. R., 2 Q. B., 439.

(3) (1885) L. L. R., 7 All., 290.

(4) (1831) L. R., 20 L. A., 90; 1 L. R., 16 All., 310.

(5) (1896) L. L. R., 18 All., 174.

The conviction and sentence had been brought to the notice of the High Court by the Registrar on the 26th November 1895. The proceedings thereupon, under the above para. 8, the hearing by the Chief Justice and five Judges, and their judgment, are reported in Volume 18, p. 174, of the Indian Law Reports, Allahabad series.

The High Court decided that the propriety in law, or in fact, of the conviction, maintained by the Court of appeal, could not be brought into question. That was final. They, however, considered it incumbent on them to consider whether there existed reasonable cause or not for removing the vakil from practice in the fact of the conviction itself. Their opinion was that the prisoner's Counsel was not precluded from showing, if he could, that the conduct of the vakil was not such as to render him unfit to be retained on the roll, and that the case presented was that the Court should consider the degree of culpability involved in the act which constituted the offence in regard to his removal, or suspension, from practice. Their conclusion was that he had proved himself unfit to remain a member of an honorable profession, and that he must be excluded from it.

The appellant obtained a certificate for appeal under section 595, Civil Procedure Code. On this appeal,

Mr. J. H. A. Branson, for the appellant, referred to *In re Weare* (1), where the Court had held that it had a discretion to remove a solicitor or not to do so after a conviction. Also to *In re a solicitor, ex parte the Incorporated Law Society* (2), where the fact of the conviction of a practitioner was not taken to add necessarily to the gravity of his offence in regard to the question of his remaining on the roll. *In re Hall* (3) there referred to. *In re Durgu Charan*, and section 12 of Act XVIII of 1879 (4), as reported contained the expression of a former Chief Justice that the pleader in that case could "go behind the

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(1) (1893) L. R., 2 Q. B., 139.

(2) (1889) 61 Law Times Rep.,
Q. B. D., 842.

(3) (1868) 18 Law Times Rep., 564;

3 Q. B., 513.

(4) (1889) 1 L. R., 7 All., 290.

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order " of the Criminal Court. *In re Dillet* (1) was also referred to. Afterwards on June 17th their Lordships' judgment was delivered by SIR RICHARD COUCH :—

This is an appeal against an order of the High Court of Judicature at Allahabad made on the 4th of January 1896 whereby it was ordered that the appellant's name should be struck off the roll of vakils entitled to practice before the said Court and his certificate should be cancelled. On the 9th of August 1895 the appellant was found guilty by the Sessions Judge of Allahabad concurring with the assessors under section 471 of the Indian Penal Code of fraudulently using as genuine a document which he knew to be forged, and sentenced to be rigorously imprisoned for three years. He appealed to the High Court by which on the 21st November 1895 the conviction was affirmed and the sentence altered to two years' rigorous imprisonment. On the 27th November 1895 the High Court ordered notice to be given to the appellant to show cause why he should not be removed from the roll of vakils and his certificate be cancelled in consequence of the offence of which he had been convicted. On the 3rd of January 1896 the case came before the Chief Justice and five Judges of the High Court and it was held that the propriety in law or in fact of the conviction could not be questioned, but the Counsel for the appellant was not precluded from showing, if he could, that the conduct of his client in the matter was not such as to render him an unfit person to be retained on the roll of the vakils of the Court. On the next day the same Judges in their judgment after stating the circumstances connected with the offence said that the appellant had attempted to deceive the Court by representing by means of a forged endorsement on a copy of a decree that an appeal was within time when he knew or must have known that it was time-barred; that this offence was not committed by an ignorant man or by a new practitioner unaccustomed to the examination of documents, nor in the hurry of the moment and without due consideration, and

(1) (1887) L. R., 12 App. Cas., 459.

made the order now appealed against. The printed case in this appeal for the appellant consists of a statement of the facts previous to the using by him of the forged document, the evidence of witnesses examined at the trial, and the judgment of the High Court on the 21st November 1895. The reasons given for the appeal are that the High Court was wrong in law in not allowing the propriety of the conviction to be questioned, that the conviction was not justified either in law or in fact, that the appellant did not fraudulently or dishonestly use the copy of the decree, that no reasonable cause had been shown to justify his removal from the roll of vakils, and the evidence given on his trial did not prove any act or practice on his part justifying the order for it. It is plain that the object of the present appeal is to have the judgment of the Sessions Judge and of the High Court on the appeal reviewed and reversed in substance if not in form. This ought not to be allowed. In effect the appellant would indirectly have an appeal against the conviction when if he had petitioned for leave to appeal against it the leave would certainly have been refused. *Ex parte Macrea* (1). Mr. Branson, who appeared for the appellant, admitted that if this review of the conviction was not allowed there were no extenuating circumstances that he could rely upon against the order. He referred to *In re Weare* (2). In that case a solicitor had been convicted by two justices of Bristol of being a party to the continued use of premises as a brothel and sentenced to a term of imprisonment, which sentence was, on appeal to the quarter sessions, set aside, and a fine of 20*l.* substituted. An application was made by the Incorporated Law Society to strike his name off the roll, which was ordered by the Divisional Court, and he appealed from that order to the Court of Appeal. The Court looked at the evidence given at the trial to see what was the nature of the offence, holding that it had a discretion and would not as a matter of course strike him off the roll because he had been convicted. This is a very different case from the present

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(1) (1891) L. R., 20 L. A., 90.

(2) L. R., 1893, 2 Q. B., 439.

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one. The judgment of Lord Mansfield in *In re Brounsall* (1) quoted by Lord Esher in his judgment is more appropriate to the present case. That was an application to the Court to strike an attorney off the roll, he having been convicted of stealing a guinea, for which offence he was sentenced to be branded in the hand and to be confined in the House of Correction for nine months. Lord Mansfield said: "This application is not in the nature of a second trial or a new punishment. But the question is whether after the conduct of this man" (*i.e.* in stealing the guinea—it does not say when, where or how—) "it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . and it is on this principle that he is an unfit person to practise as an attorney. It is not by way of punishment, but the Court in such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not. Having been convicted of felony we think the defendant is not a fit person to be an attorney." Lord Esher in *Weare's case* adds: "There it seems to me is the whole law on the matter laid down as distinctly as can be, and in a way the propriety of which nobody, as it appears to me, can doubt." The case in 61 *Law Times* 842 also referred to by Mr. Branson is only an authority that the Court has a discretion. The case in 7 *All.* 290 was under Section 12 of Act XVIII of 1879, which gives power to the High Court to suspend or dismiss any pleader holding a certificate who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader. It does not appear in the report whether the Court considered that the conviction of the pleader of cheating was wrong, or that in the exercise of its discretion he should not be suspended or dismissed. It was a case where the nature of the offence might reasonably be inquired into. Their Lordships do not agree with the Chief Justice where he says that the pleader's Counsel was entitled to go behind the conviction in order to show that he had committed no offence at

(1) 2 Cowper's Reports, 829.

law. In the present case the conviction of forgery, followed by a sentence of two years' rigorous imprisonment, is sufficient without further inquiry to justify the Court in removing the appellant from the roll of vakils, and cancelling his certificate. Their Lordships will therefore humbly advise Her Majesty to affirm the High Court's order and to dismiss the appeal.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Barrow, Rogers and Nevill.*

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APPELLATE CIVIL.

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Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Know
BASDEO (DEFENDANT) v. JOHN SMIDT AND OTHERS (PLAINTIFFS) *
Civil Procedure Code, Sections 51, 578—Plaint not signed by plaintiff or
his authorized agent—Effect of such want of signature—Plaint not
necessarily void—Breach of contract—Measure of damages.

Held, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf as required by section 51 of the Code of Civil Procedure will not necessarily make the plaint absolutely void. A defect in the signature of the plaint, or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and, having regard to section 578 of the Code of Civil Procedure, is not a ground for interference in appeal. *Rajit Ram v. Katesar Nath* (1) and *Mohun Mohun Das v. Bungsi Buddan Saha Das* (2) referred to. *Marghub Ahmad v. Nihal Ahmad* (3) overruled. *Mahabir Prasad v. Shah Wahid Alam* (4) distinguished. *Katesar Nath v. Aggyan* (5) and *Badri Prasad v. Bhagwati Dhar* (6) discussed.

The plaintiffs sold to the defendant a certain number of cases of embroidered muslin. The defendant took delivery of some of the cases, but refused to take delivery of or pay for the rest. The plaintiffs re-sold the goods refused by the defendant, and brought a suit against the defendant for damages. *Held*, that the proper of damages was the difference between the contract price

* Second appeal No 471 of 1897, from a decree of J. E. Gill, Esq., District Judge of Cawnpur, dated the 29th March 1897, confirming a decree of Rai Kishen Lal, Subordinate Judge of Cawnpur, dated the 5th October 1896.

(1) (1896) I. L. R. 18 All., 396. (4) (1891) Weekly Notes, 1891, p. 152.
(2) (1889) I. L. R., 17 Calc., 580. • (5) (1894) Weekly Notes, 1894, p. 95
(3) (1899) Weekly Notes, 1899, p. 55. (6) (1894) I. L. R., 16 All., 240.

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of the goods which the defendant had refused to accept, and the price realized by the plaintiffs on the re-sale. *Moll Schutte & Co. v. Luchmi Chand* (1) followed. *Fule & Co. v. Mahomed Hossain* (2) dissented from.

THIS was a suit to recover damages alleged to have been incurred by the plaintiffs by reason of the defendant's refusal to take delivery of and to pay for certain goods which he had contracted to purchase from the plaintiffs. The Court of first instance (Subordinate Judge of Cawnpore) gave the plaintiffs a decree. The defendant appealed, but his appeal was dismissed by the lower appellate Court (District Judge of Cawnpore). The defendant appealed to the High Court, and there a new point was raised, which had not been taken in either of the Courts below, namely, that "the suit of the plaintiffs is defective in point of law and is wrongly framed and should have been dismissed." This ground of appeal was explained at the hearing to convey an objection to the form of the plaint, the contention being that inasmuch as the person who had signed the plaint on behalf of the plaintiffs was not duly authorized so to sign on their behalf, the plaint was in effect unsigned, and there had never been before the Court any suit of which cognizance could legally be taken. There was on the record no power of attorney authorizing the signature of the plaint and nothing otherwise to show that the person who signed it was authorized to sign within the meaning of section 51 of the Code of Civil Procedure.

Mr. R. Malcomson (with whom Pandit Sundar Lal) for the appellant.

The suit ought to have been dismissed on the ground that the plaint was not signed by the plaintiffs or by anyone duly authorized by them in that behalf. No Civil Court can take cognizance of a suit without having before it in the first instance a properly constituted plaint, that is to say, a plaint which complies with the requirements of sections 49, 50, 51 and 52 of the Code of Civil Procedure. In this case the plaint was signed on behalf

(1) (1898) I. L. R., 25 Calc., 505

(2) (1896) I. L. R., 24 Calc., 124.

of the plaintiffs by Mr. C. G. Sanders, but Mr. Sanders was not authorized to sign plaints, or this particular plaint, on behalf of the firm. The plaint must therefore be regarded as unsigned. This being so, the so-called plaint was, within the rulings of this Court, no more than a "piece of waste paper"—*Mahabir Prasad v. Shah Wahid Alam* (1), *Katesar Nath v. Aggyan* (2), *Marghub Ahmad v. Nihal Ahmad* (3).

In view of the rule laid down in the last mentioned case, the Court has no power to amend an unsigned plaint or to allow amendment thereof. The defect is much more than a mere irregularity which may be cured by amendment: it is an absolute bar to the entertainment of the suit. Section 578 of the Code of Civil Procedure could not be applied, inasmuch as there was here no suit before the Court of which cognizance could be taken or in the course of which any error defect or irregularity could possibly be committed. I would adopt the reasoning set forth in the judgments in *Katesar Nath v. Aggyan* and *Marghub Ahmad v. Nihal Ahmad*.

Babu *Durga Charan Banerji*, with The Hon'ble Mr. *Conlan* and Munshi *Ram Prasad*, for the respondents.

I contend that the provision contained in section 51 of the Code of Civil Procedure as to signature and verification is a rule of Procedure merely and any defect in signature does not affect the merits of the case. In order to show that the omission to sign in compliance with section 51 will not lead to the dismissal of the suit it is necessary to show that the plaint was not the plaintiff's plaint. In this case there is no room for such contention upon the admitted facts. If the defect had been pointed out it could and would have been remedied. The defect is certainly covered by section 578 of the Code. Moreover, the defendant by his pleadings and conduct must be held to have waived the irregularity. There was a valid plaint as required by law, and any defect in the prescribed formality as to signature could be remedied

(1) (1891) Weekly Notes, 1891,
p. 152.

(2) (1894) Weekly Notes, 1894,
p. 95.

(3) (1899) Weekly Notes, 1899, p. 55.

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as well as waived. The plaint without the signature is not necessarily a piece of waste paper as contended for on the other side. I rely on *Rajil Ram v. Katesur Nath* (1) and *Fateh Chand v. Maneab Rai* (2). The plaintiff, although he may not have signed the plaint, is none the less plaintiff in the suit, and it cannot be contended upon the admitted facts of this case that he has in any way or at any stage repudiated the plaint as his.

STRACHLEY, C. J.—There are in substance two objections taken on behalf of the appellant. The first objection is not set forth in the memorandum of appeal, but upon an application made to us under section 542 of the Code of Civil Procedure, we allowed the learned counsel for the appellant to argue in support of it. That objection is that the plaint was not signed as it should have been in accordance with section 51 of the Code, and that consequently all the proceedings in the suit have been bad and void *ab initio*. Now, with regard to that objection, the plaint purports to be signed on behalf of the plaintiffs by an advocate of this Court, who, as the Munsarim's note shows, himself filed the plaint, and also by a gentleman named C. G. Sanders who purports to sign as "agent" for the plaintiffs, who are a firm of foreign merchants, residing out of, but trading within, British India. There is no finding which would justify us in holding that Mr. Sanders was a recognised agent of the plaintiffs within the meaning of section 37 of the Code, so that the point considered in *Maharanees Surnomoye v. Poolun Behary Mundul* (3) and *Roy Dhunput Singh v. Jhoomuk Khauas* (4) does not arise. There is on the record no power of attorney authorizing Mr. Sanders to sign the plaint on behalf of the plaintiffs, and there is nothing which otherwise shows that he was so authorized within the meaning of section 51. The most probable reason why there is nothing of the kind on the record is that, until the point was raised for the first time in second appeal, the defendant appears

(1) (1896) 1 L. R., 18 All., 396.

(3) (1878) 3 C. L. R., 15.

(2) (1898) Weekly Notes, 1898, p. 110. (4) (1879) 3 C. L. R., 579.

never to have thought of suggesting that Mr. Sanders was not authorized to sign the plaint, or that there was any sort of defect or irregularity in the institution of the suit. There is no such suggestion in the defendant's written statement, in the issues, the judgments of the Courts below, the defendant's memorandum of appeal in the lower appellate Court, or his memorandum of appeal to this Court. Now, in the first place, as I have said already, the plaint is signed and was filed by an advocate of this Court, who thus claimed to represent the plaintiffs named in the plaint. The decrees of both the Courts below show that throughout the trial of the suit in both Courts the same advocate appeared and conducted the case as representing the plaintiffs. There is no plea, no suggestion, still less any finding, that that advocate did not possess in fact the authority to represent the plaintiffs named in the plaint which he claimed throughout to possess. On the contrary it is clear that the suit was throughout contested entirely on the merits, and on the assumption of everybody that it was properly brought by the right parties. Under section 39 of the Code an advocate of this Court does not depend for his authority to represent a party upon any document empowering him to act. It appears to me that in the total absence of any finding, evidence or suggestion to the contrary, it must be presumed that the plaintiffs named in the plaint were throughout represented in the suit by the counsel who claimed to represent them, and that the suit was therefore instituted and conducted throughout with the knowledge and authority of those plaintiffs. Bearing this in mind, I have come to the conclusion, first, that the defect in the plaint arising from non-compliance with section 51 has been waived by the defendant, and that therefore the suit cannot on that ground be now dismissed. Secondly, that the defect falls within section 578 of the Code, which prohibits our interference with the decrees below on the ground of any error, defect, or irregularity which affects neither the merits of the case nor the jurisdiction of the Court. If it were necessary, I should be prepared to hold, having regard

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to the judgment of this Court in *Rajit Ram v. Katesar Nath* (1), that we are, even at this stage, competent under section 53 (c) of the Code to direct that the plaint be amended by the addition of the signature of the plaintiffs or of any person duly authorized by them in that behalf. But for the reasons which I have indicated, I am of opinion that any such amendment is unnecessary. The argument on behalf of the appellant is shortly this, that where a plaint is not signed in accordance with section 51, not merely is there "an error, defect or irregularity," but there is no suit: the plaint is "waste paper," and the Court has no suit before it which it can legally decree. From this argument I entirely dissent. Section 48 of the Code shows that a suit is instituted by presenting a plaint to the Court or to the proper officer. The Code contains no definition of a plaint, but section 50 shows what a plaint substantially is, and states the various particulars which it must contain. It says nothing about signature, and in no way suggests that what it describes as a plaint is not a plaint if it is unsigned or if the signature is in any way defective. Section 51 deals with the signature and verification of the plaint. It places the signature and the verification on exactly the same footing. In that connection I observe that at page 400 of the report in *Rajit Ram v. Katesar Nath*, the Full Bench of this Court observed:—"It would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or the jurisdiction of the Court." There is nothing whatever in section 51 to suggest that, if its terms are not complied with, the defect stands on any different footing from the other defects mentioned in section 53 (b), or involves any other consequence than rejection of the plaint if not amended in accordance with an order for amendment, or that the defect cannot be waived like other initial irregularities, or that the plaint by reason of the defect is necessarily "waste paper," or that there is no suit legally before the Court. The object of the verification of the plaint

(1) (1896) I. L. R., 18 All. 306.

is to fix upon the plaintiff the responsibility for the statements which it contains, and to afford a guarantee of his good faith. The object of the signature to the plaint is to prevent, as far as possible, dispute as to whether the suit was instituted with the plaintiff's knowledge and authority. I do not underrate the importance of this: but there may be other ways of establishing the plaintiff's responsibility besides signature; and the fact that the Code contains no provision requiring an appellant to sign his memorandum of appeal supports this view. In a work by a learned American author, Mr. Vanfleet, "*The Law of Collateral Attack on Judicial Proceedings*," there is stated what, I think, is the true principle as to verification, and the whole context shows that the principle is equally applicable to signature, which section 51 places on the same footing. At page 235 he says:—"The statutes require many kinds of petitions to be verified. This includes generally all complaints and petitions in special proceedings, the bill in equity, the libel in admiralty, and, in some states, the complaint or petition in all cases. Such verification adds no allegation to the pleading and tenders no issue. Its only object is to show the good faith of the petitioner. In other words, if he will not swear that he believes his cause to be just, the law does not care to bother with it. But when the adversary comes in, such verification is of no moment. It is not even evidence. The justice of the cause must then be proved by competent evidence. Like any other formal matter its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction, of course, mere defects in it cannot."

Section 53 (b), (2) clearly shows that there may be a plaint within the meaning of the Code, although the plaint is not signed and verified as required by section 51. If such a plaint were "waste paper," or not a plaint at all within the meaning of the Code, the section would not have called it a plaint and would not have provided for its amendment. It is only upon the plaintiff's failure to comply within the time fixed by the Court, with the order allowing the amendment, that such a plaint has to be

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rejected under section 54 (d). The doctrine that the plaint is waste paper because it is not duly signed in accordance with section 51 of the Code, and that there is consequently no legal suit before the Court, is opposed to the judgments of this Court in three connected unreported cases, First Appeals Nos. 170, 126 and 29 of 1895, in which the plaint was, at the stage of first appeal, returned for amendment under section 53, on the ground that the person who had signed it was not duly authorized in that behalf by his power of attorney. In these cases the objection was taken by the defendant in his memorandum of appeal; and, in two at least out of the three, was specifically pleaded by him and put in issue in the Court below. The doctrine that a plaint not duly signed is necessarily waste paper also appears to me to be opposed to the judgment of the Privy Council in *Mohini Mohan Das v. Bangsi Baddan Saha Das* (1). In that case there were three plaintiffs named in the plaint as joint creditors. Only one of them signed and verified the plaint. Some time after the plaint was filed, the Court made an order adding another of the joint creditors as a plaintiff, evidently on the view that he was not one already. The suit was dismissed on the ground that it must be regarded as instituted on the date of the order, and that, so regarded, it was barred by limitation. On appeal the Privy Council set aside the dismissal, holding that all the creditors became plaintiffs when the plaint was filed, that the order was "merely waste paper," and that the suit was not barred. Their Lordships observed:—"On the face of the plaints the three joint creditors are named as co-plaintiffs. The names of Gobiud Rai and Khettar Mohun have not been struck out, nor did they, or either of them, attempt to repudiate the suits. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint." Observe, they do not say that a person named as a co-plaintiff need not sign and verify the plaint. They could not have said so, for section 51 makes no distinction between a co-plaintiff and a

(1) (1889) I. L. R., 17 Cal., 580.

single plaintiff. What they say is, that it does not follow from his omitting to sign and verify the plaint that he is not to be treated as a plaintiff. They further indicate the considerations which, in that case, prevented such a consequence from following. The persons in question were named as co-plaintiffs on the face of the plaint; their names had not been struck out; they had not attempted to repudiate the suit. In other words, there was no reason to doubt that the suit was really theirs, and, that being so, their omission to sign the plaint would not justify the Court in treating them as not plaintiffs. Nothing in the judgment turns upon their being joint creditors with the plaintiff who had signed, or upon any supposed authority in him to sign on their behalf. Several cases have been cited in support of the argument I am considering. The first was *Mahabir Prasad v. Shah Wahid Alam* (1). That case is, I think, clearly distinguishable. The evidence there showed that the so-called plaintiff knew nothing whatever about the suit and was not a party to its institution. The second case was *Katesar Nath v. Aggyan* (2). It does not appear to me quite clear from the report whether the learned Judge held that there was no legal plaint and no legally instituted suit merely because the plaint was not signed in accordance with section 51, or whether he so held on the ground that there was no valid authority given by the plaintiff for the institution of the suit. My doubt arises from the learned Judge's allusion to the case of *Badri Prasad v. Bhagwati Dhar* (3), which has nothing to do with the signing of the plaint, but relates only to the conditions under which a suit or appeal may be filed under a vakalatnamah. The case of *Katesar Nath v. Aggyan* was a decision of a single Judge of this Court, and if it means that, in all circumstances whatever, whether the plaintiff knew of and authorized the suit or not, whether the defendant waived the defect or not, and notwithstanding section 578 of the Code, an unsigned plaint is necessarily waste paper,

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(1) Weekly Notes, 1891, p. 152.

(2) Weekly Notes, 1894, p. 95.

(3) (1894) I. L. R., 16 All., 240.

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and a Court of appeal is at liberty to treat the suit as no suit at all, then, with the greatest respect for the learned Judge, I cannot agree with him. The last case on the point to which I need refer is the case of *Murghub Ahmad v. Nihal Ahmad* (1). In that case not only did the defendant make no objection that the plaint was not duly signed, but he expressly stated that he desired the suit to be disposed of on the merits. In that suit also, so far as one can gather from the report, although the plaintiff had not signed the plaint, there seems to have been no doubt at all that the suit was instituted with his knowledge and authority, but it was held that, notwithstanding these facts, neither the Court below nor this Court had power to allow any amendment, and that the plaint must be rejected. All I can say as to that case, in which no doubt it was held that the plaint in such cases was "a piece of waste paper," and that there was no suit before the Court, is that it appears to me to be wholly at variance with the three unreported decisions which I have mentioned, that in this conflict of authority it is open to me to adopt the view which I think right, and that I unhesitatingly prefer that taken in the unreported cases. In my opinion, to dismiss a suit at the stage of second appeal upon a point of this kind never raised before by the defendant, would be to sacrifice the substantial merits and justice of the case for the sake of technicality, to an extent to which I could never agree. Although I do not say that an objection founded on section 51 is always and necessarily one of pure form, I think that it is so here, and that this objection therefore to the decrees of the Courts below must be over-ruled.

The only other objection which has been pressed is that the Courts below have applied a wrong principle as to the measure of damages. The damages claimed are the difference between the contract price of the goods which the defendant refused to accept and the price realized by the plaintiffs on the re-sale. That claim is in accordance with the clause in the indent contract, which is admittedly indistinguishable from the clause under

(1) Weekly Notes, 1899, p. 55.

consideration by the Full Bench of the Calcutta High Court in *Moll Schutte and Co. v. Luchmi Chand* (1). That case is exactly in point, and the only question is, whether we ought to follow it or the previous decision of the same Court in *Yule and Co. v. Mahomed Hossain* (2). For my part I have no hesitation in agreeing with the decision in the later case, and I adopt all that was said by the Chief Justice in delivering the judgment of the Full Bench. In this case, as in that, section 107 of the Contract Act has no application. I think that the Courts below have taken the right view of the measure of damages, and that this appeal should be dismissed with costs.

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KNOX, J.—I too am of the same opinion, namely, that although the plaint in the case in which this appeal arises was not signed by the plaintiffs as required by section 51 of the Code of Civil Procedure, the circumstances of the case raise a proper presumption that the plaintiffs have been privy to the suit throughout.

As the learned Chief Justice has pointed out the plaintiffs were represented by an advocate of this Court. The appearance in and prosecution of the suit by such advocate can be and must be taken to be an appearance by the plaintiffs themselves, especially as it was never suggested until the case came before the Court in Second Appeal that there could be any doubt upon the matter at all.

In First Appeal No. 170 of 1895, decided on the 22nd July, 1898, a decision of which I was one of the Judges, and which more-over is a stronger case, inasmuch as it was a case in which the plaintiffs were not represented in the Court of first instance by an advocate, my brother Banerji and myself were prepared to hold that the plaint might even in the appellate stage be amended and rectified. *Marghub Ahmad v. Nihal Ahmad* (3), is an authority at variance with this; but I have heard nothing which leads me to differ from the view which I took in F. A. No. 170 of 1895. In that case, the absence of the signature of the

(1) (1898) I. L. R., 25 Calc., 505.

(2) (1896) I. L. R., 24 Calc., 124.

(3) (1899) Weekly Notes, 1899, p. 55.

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plaintiffs was held not to be a defect which affected the merits of the case or the jurisdiction of the Court; in my opinion no ground has been made out, so far as this appeal is concerned, for interference with the decrees of the Courts below.

The only other question raised before us, namely, as to damages, was fully considered in the case of *Moll Schutte and Co. v. Luchmi Chand* (1), and I agree with the way in which it was then decided.

Appeal dismissed.

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FULL BENCH.

*Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Know,
 Mr. Justice Banerji and Mr. Justice Aikman.*

LALTA PRASAD (APPLICANT) v. NAND KISHORE AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, sections 102, 103, 157—Order dismissing a suit for default of appearance—Construction of order—Application for restoration of suit—Pleadings—What constitutes an “Appearance”.

In construing an order alleged by one side and denied by the other to be an order under section 102 of the Code of Civil Procedure, the order will be considered as an order under section 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear.

Where, his suit having been dismissed for default of appearance under section 102 of the Code, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear.

It is not an “appearance” within the meaning of section 102 of the Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply

*First Appeal No. 22 of 1899 from an order of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 23rd January 1899.

(1) (1898) I. L. R., 25 Cal., 505.

for an adjournment. *Shankar Dat Dube v. Radha Krishna* (1) and *Soonderlal v. Goorprasad* (2) approved. *Mahomed Azeem-ool-lah v. Ali Buksh* (3) *Kashi Parshad v. Debi Das* (4) and *Kanahi Lal v. Naubat Rai* (5) referred to.

THIS was an appeal under section 588 (8) of the Code of Civil Procedure from an order rejecting an application made under section 103 of the Code by a plaintiff whose suit had been dismissed. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff, two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court rejected the application for an adjournment and proceeded to pass the following order dismissing the suit:—"Up to the present this case has been adjourned four times since June 1898, on applications made by the plaintiff. Finally proclamations and warrants were issued for some of the plaintiff's witnesses, who have with difficulty been got to attend to-day; but the plaintiff has been called, and he himself is not present, and his pleaders being unable to proceed with the case, have made this application for adjournment. In the

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(1) (1897) I. L. R., 20 All., 195.

(2) (1898) I. L. R., 23 Bom., 414.

(3) (1878) N.-W. P. H. C. Rep.,

1878, p. 74.

(4) (1875) N.-W. P. H. C. Rep.,

1875, p. 77.

(5) (1881) I. L. R., 3 All., 519.

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application no reasonable cause is given for adjournment. Sickness, or a friend being at the point of death, is not a proper ground for non-prosecution, especially when no certificate of sickness has been produced. It appears that for some reason there is intentional inaction on the part of the plaintiff. Under these circumstances the case cannot remain pending. The Court cannot waste its time over the business of such a negligent party. It is therefore ordered that the claim of the plaintiff be dismissed for default of appearance and for want of prosecution, with costs; the costs of the defendant to be borne by the plaintiff."

On the 22nd of December 1898 the plaintiff applied for restoration of the suit to its original number, urging that there was in fact sufficient and reasonable cause for his not having prosecuted the suit on the 25th of November.

The defendants filed a counter application pleading (1) that the case had not been dismissed in default of prosecution, (2) that the case had not been decided *ex parte*, (3) that the petitioner ought to have filed an appeal against the order of the Subordinate Judge, and (4) that no good reason for the petitioner's absence on the 25th November had been, or could be, shown.

The Subordinate Judge disallowed the plaintiff's application on the ground that the order dismissing the suit was not in effect an order under section 102 of the Code, that it was a dismissal for want of proof, and therefore the plaintiff's remedy was by appeal against the decree and not by application under section 103.

Against this dismissal the plaintiff appealed to the High Court.

Munshi *Gulzari Lal* for the appellant.

The order of the 25th November 1898 as rightly understood was an order under section 102 read with section 157 of the Code of Civil Procedure. It clearly says that the suit was dismissed "for default of appearance and want of prosecution" the evidence upon the record was not taken into consideration and the suit was not decided upon the merits. The Court in dealing with the

subsequent application under section 103 of the Code was not competent to go behind the order passed under section 102 and say that it was a wrong order and therefore an application under section 103 would not lie. The Court had only to interpret that order and to see whether it was really an order passed under section 102 and then to deal with the application under section 103 on the merits. I submit that the order of the 25th November was in substance and effect an order under section 102. The circumstances under which it was passed were exactly those under which an order under section 102 of the Code would be legally justified. The pleaders who presented the application for adjournment on that date on behalf of the plaintiff-appellant were not instructed to go on with the suit in case the application was refused. The following cases were referred to :—

Fazal Ahmad v. Bahadur Singh (1), *Hira Das v. Hira Lal* (2), *Rumtahal Ram v. Rameshar Ram* (3), *Shankar Dat Dube v. Radha Krishna* (4), *Bhūmacharya v. Fakirappa* (5), *Administrator-General of Bengal v. Lala Dayaram Das* (6), *Zeinulabdin Khan v. Ahmed Raza Khan* (7), *Jonardan Dobey v. Ramdhone Singh* (8), *Bhagwan Das v. Hira* (9), *Shrimant Sagajirao v. S. Smith* (10) *Soonderlal v. Goorprasad* (11). The cases in I. L. R. 20 Allahabad and 23 Bombay are exactly in point. There seems to be no conflict of authority upon the point that an un-instructed pleader or counsel cannot represent a party in a court of justice.

Pandit *Sundar Lal* for the respondents.

Under section 157 of the Code of Civil Procedure if on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may dispose of the suit in one of the modes provided in chapter VII of the Code, or make such order as it thinks fit. The 25th November 1898 was the

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| (1) (1892) Weekly Notes, 1893, p. 25. | (6) (1871) 6 B. L. R. 688. |
| (2) (1885) I. L. R., 7 All., 538. | (7) (1878) L. R. 5 I. A., 233. |
| (3) (1886) I. L. R., 8 All., 140. | (8) (1896) I. L. R., 23 Cal., 738. |
| (4) (1897) I. L. R. 20 All., 195. | (9) (1897) I. L. R., 19 All., 355. |
| (5) (1867) 4 Bombay H. C., Rep., 206 A. C. J. | (10) (1895) I. L. R., 20 Bom., 736. |
| | (11) (1898) I. L. R., 23 Bom., 414. |

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date of adjourned hearing of the case. Documentary evidence had already been filed. The Court could either dismiss the suit under section 102 of the Code, if the plaintiff did not appear, or dispose of the case on the merits on the evidence on the record. In the latter case the plaintiff's remedy is by way of appeal under section 540 of the Code, and not under section 103 of the Code. The plaintiff's pleader was present before the Court. Whether his presence was appearance under section 102 of the Code or not depended upon the instructions he had received—*Soonderlal v. Goorprasad* (1). There is nothing on the record to show that he had no instructions to appear. The order of the 25th of November 1898, read with the order under appeal, shows that the Court did not dispose of the suit under chapter VII of the Code, but on the merits. Therefore no application can be made under section 103 of the Code. There must be an order under section 102 of the Code, before an application under section 103 can be made—*Mahomed Azeem-ool-lah v. Ali Buksh* (2) and *Kashu Parshad v. Debi Das* (3). The case of *Kanahi Lal v. Naubat Rai* (4) also supports this contention.

Munshi *Gulzari Lal* in reply—The rulings relied upon by the other side do not really decide the point arising in this case. Some of them are clearly distinguishable and the others, I contend, were not rightly decided. The opening words of section 103 make it abundantly clear that a court in dealing with an application under that section should not reconsider its order under section 102 of the Code.

STRACHEY, C. J.—This is an appeal under section 588 (8) of the Code of Civil Procedure from an order rejecting an application by a plaintiff under section 103. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff,

(1) (1898) I. L. R., 23 Bom., 411.

(2) (1873) N. W. P., H. C. Rep.,
1873, p. 74.

(3) (1875) N. W. P., H. C. Rep.,
1875, p. 77.

(4) (1881) I. L. R., 3 All., 519.

two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November, 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court made an order rejecting the application for adjournment and also dismissing the suit. The earlier part of that order referred to the number of adjournments already granted, and then continued :—"The plaintiff was called and he himself is not present, and his pleaders, being unable to proceed with the case, have made this application for adjournment. In the application no reasonable cause is given for adjournment." The order went on to criticise the reasons put forward in the application, and to say that the plaintiff seemed to be "intentionally negligent." The order concludes with these words :—"Therefore it is ordered that the claim be dismissed for default of appearance and for want of prosecution, with costs." It will be observed that the order makes no reference to the evidence, oral and documentary, which had already been taken in the case. We construe that order as an order passed under the earlier portion of section 157 of the Code. In other words, the Court, in our opinion, regarded the case as one in which the plaintiff had failed to appear at the adjourned hearing, and proceeded to dispose of the suit in one of the modes directed in that behalf by Chapter VII, that is, under section 102 of that chapter. We have arrived at this construction by a consideration of the terms of the order as a whole, and more especially with regard

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to three points. The first is the expression *baghair haziri*, or "default of appearance." That is the expression which a Court ordinarily uses when dismissing a suit for default of the plaintiff's appearance. The second point is that if the suit had been dismissed otherwise than under section 102, one would have expected the order to have at least referred to the evidence previously adduced by the plaintiff. The third point is that in awarding costs to the defendant the Court awarded half the pleader's fees only, and in doing so obviously acted with reference to Rule 458 of the Rules of the 4th April 1894, which is applicable only to cases in which one of the parties does not appear, and which is not applicable where both parties appear and the case is decided after contest. We also construe that order as meaning that the pleaders for the plaintiff, though present and applying for an adjournment, were not duly instructed for the purpose of proceeding with the suit, or instructed otherwise than for the purposes of the application. The order refers to those pleaders as unable to proceed with the case, that is unable in consequence of the plaintiff's absence; and when, notwithstanding the presence of the pleaders, it describes the suit as dismissed for default of appearance, we think that the Court was presumably referring to those cases in which it has been held that the mere physical presence of a pleader not instructed except for the purpose of applying for adjournment, is not an appearance in the suit in the sense of Chapter VII of the Code.

That being our construction of the order, what next happened was that on the 22nd of December 1898 the plaintiff made an application under section 103 of the Code for an order to set the dismissal aside. The Court rejected that application on the ground that the dismissal of the suit could not be treated as a dismissal for want of appearance of the plaintiff under section 157 read with section 102, but must be treated as a dismissal on the merits, and for want of proof, having regard to the fact that evidence had been taken and was on the record. The Court observed that the contention of the pleaders, that on the 25th

of November they had had no instructions, could not be maintained. It, however, did not go into any evidence as to the nature or extent of the pleader's instructions, no doubt because, in the view which it took of that case, that question was not material. The Court held that as the suit had not been dismissed for default of appearance, the application under section 103 could not be maintained. It therefore dismissed the application, and the plaintiff now appeals to us from that decision.

The contention of the plaintiff in this appeal is that the suit was in fact dismissed under section 157 read with section 102, and that his application under section 103 ought therefore to have been determined as such an application properly made, and on the merits. He contends that as he was not present on the 25th of November, and as his pleaders, though present, were not duly instructed in the suit, there was a dismissal of the suit for default of appearance under section 102. In support of that contention he relies on, amongst other authorities, the decision of this Court in *Shankar Dat Dube v. Radha Krishna* (1) and of the High Court of Bombay in *Soonderlal v. Goorprasad* (2).

The defendants support the decision of the Court below. They contend on two grounds that section 102, and therefore section 103, is not applicable to the case. The first ground is, that the order of dismissal does not purport to be passed under section 102, and on its true construction is not an order under that section. The second ground is that, even if the Court purported to act under section 102, or intended so to act, it could not legally dismiss the suit under section 102, because there was in law an appearance of the plaintiff within the meaning of section 102. It was further argued that the order dismissing the suit, as it could not be considered a legal order under section 102, must be treated as an order dismissing the suit in the ordinary way on the merits, or at all events not for want of appearance, and that the plaintiff's remedy was not by way of application under section 103, but by way of appeal. In support of this contention the learned advocate for the

(1) (1897) I. L. R., 20 All., 195.

(2) (1898) I. L. R., 23 Bom., 414.

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defendants cited, amongst others, the cases of *Mahomed Azeemool-lah v. Ali Buksh* (1), *Kashi Parshad v. Debi Das* (2) and *Kanahi Lal v. Naubat Rai* (3).

The reply of the plaintiff to this contention is, first, that the order on its true construction is an order of dismissal under section 102; and secondly, that a defendant cannot, in reply to an application under section 103, be heard to say that an order purporting to be passed under section 102, was one which the Court had no power to make under that section, or to contend for any reason that, contrary to the meaning and effect of that order, the plaintiff had actually appeared when his suit was dismissed for non-appearance.

Now in the first place, as I have already stated, we construe the order of the 25th of November 1898, as an order by which the Court intended to act and believed itself to be acting under section 157 read with section 102. It is not necessary to repeat the reasons which I have already given for that construction. In the second place, what is the meaning of the opening words of section 103 of the Code "when a suit is wholly or partially dismissed under section 102?" Is it a dismissal under section 102 merely if the order says that it is passed under section 102? Or is it only a dismissal under section 102, if, irrespective of the language of the order, the suit was dismissed upon an actual non-appearance of the plaintiff in fact or law? Or is the suit dismissed under section 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance, or non-appearance, the real meaning and substance of the Court's action is that it dismisses the suit on the view, whether right or wrong, that the defendant appears and the plaintiff does not appear? We think that the third of these views is the correct one. The mere naming of the section is not conclusive though, no doubt, it may be a useful piece of evidence in construing the order, which must be

(1) (1873) N.-W. P. H. C. Rep.,
1873, p. 74.

(2) (1875) N.-W. P. H. C. Rep.,
1875, p. 77.

(3) (1881) I. L. R., 3 All., 519.

read and construed as a whole. But, although the Court may describe an order of dismissal, as being made under section 102, the order, taken as a whole, may show that the description is an error, and that the Court was not really dismissing the suit on the view that the plaintiff was not appearing. So, too, if section 102 is not named, and even if some other section, whether section 158 or any other, is named, still it may be that that is a mere misdescription, and that nevertheless the real reason for the dismissal is that in the Court's view the defendant appears and the plaintiff does not appear. In such a case, notwithstanding the misdescription, there is in substance and in fact a dismissal of the suit for non-appearance of the plaintiff, and therefore a dismissal under section 102, although that dismissal may be absolutely wrong, either because the Court was mistaken in supposing that the plaintiff did not appear, or for any other reason. If the Court was mistaken in supposing that the plaintiff did not appear, still, whether the mistake was one of fact or of law, the appearance would not make the dismissal one not ordered under section 102, it would only make the dismissal under that section a wrong one. In other words, a suit is dismissed under section 102 if the dismissal is based on the state of things contemplated in that section, that is, if the Court's reason for the dismissal is its view that the plaintiff has not appeared.

If that is the correct view of the meaning of the opening words of section 103, referring to a suit being dismissed under section 102, it follows that a plea by the defendant, in answer to the plaintiff's application under section 103, that the order under section 102 was illegally made, is irrelevant. Section 103 allows the plaintiff to apply for an order to set the dismissal aside, where the suit has been in fact wholly or partially dismissed under section 102. If there has been such a dismissal in the sense I have explained, whether right or wrong, the plaintiff is entitled to apply to the Court to set it aside, and it is no answer to such an application to say that the order sought to be set aside was illegal for any reason whatever. Therefore the defendant cannot contest the

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application *in limine* as one which cannot be entertained at all under section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law. But what can the defendant do? He is entitled to meet in any way that is relevant the plaintiff's allegation, which is the only ground on which such an application can succeed, that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing. In order to succeed the plaintiff must prove that he was so prevented from appearing. The defendant may prove that the plaintiff was not prevented from appearing. Those terms would undoubtedly cover contention by the defendant that the plaintiff was not prevented from appearing because, in fact, he did appear, so that true contention that there was such an appearance in fact and which though it cannot be used as a bar to the application under section 103 *in limine* would still be material on the merits of the application and as a ground for dismissing it under section 102.

Now in the present case the plaintiff did not appear in person. If he appeared at all, it was by his pleader. If his pleaders were not duly instructed and able to answer all material questions relating to the suit, if they were not, if, indeed, only to apply for an adjournment, then the suit must be dismissed. That according to the authorities, and in fact, it is. Owing to *Shankar Dat Dube v. Radha Krishna Soonderlal v. Goorprasad*, with which we agree, the plaintiff did not appear at all. Therefore all depends on two questions: first, were the pleaders duly instructed in the sense of these authorities? and, secondly, if they were not, and if consequently there was no appearance by the plaintiff on the 25th of November 1898, was he prevented by any sufficient cause from appearing?

These questions have not been considered by the Court below. It did not consider them because of the erroneous view which it formed of the nature of the order of dismissal. It should have treated that order as a dismissal of the suit under section 102, and

disposed of the application solely with reference to the circumstances contemplated by section 103. The order must be set aside as in effect passed on a preliminary point, and the case must go back to the Court for the application under section 103 to be disposed of on the merits. In this judgment I have not thought it necessary to discuss in detail the various cases that have been cited. If any of them, being decisions of this Court, and especially the cases reported in N.-W. P. H. C. Rep., 1873, p. 74, N.-W. P. H. C. Rep., 1875, p. 77, and I. L. R., 3 All., 519, contain anything inconsistent with the views expressed in this judgment, they must be considered overruled to that extent. The appellant will have his costs of this appeal. The other costs will abide the result.

KNOX, J.—I fully agree with the order proposed and with the reasons given for the same.

BANERJI, J.—I am of the same opinion, but desire to make a few observations. Two points have been conceded, and in my opinion rightly conceded, by the learned advocate for the respondents. The first is that if the dismissal of the plaintiff's claim was in fact and in law a dismissal under the first part of section 157 of the Code of Civil Procedure, that is, a dismissal under section 102, on the ground of the plaintiff's failure to appear at the adjourned hearing of the suit, the plaintiff has a remedy under section 103. The second point is, that the mere presence of a pleader at the hearing is not an appearance within the meaning of the Code unless the pleader was duly instructed and able to answer material questions relating to the suit. On both these points the course of rulings in this Court in recent years, and in the other High Courts is to the effect that in the former case an application can be made under section 103, and in the latter, that the party represented by a pleader without instructions must be deemed not to have appeared. There is no reason to depart from this consensus of rulings. The learned advocate for the respondents contends that whenever an application is made under section 103, the first question to be determined is, whether the order which is sought to be

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set aside could legally have been made under section 102. With this contention, and the rulings which support it, I am unable to agree. What the Court has to determine is, whether the order of dismissal was, in fact, made under section 102; that is, whether it was made on the ground that the plaintiff did not appear and the defendant did appear, not whether that order was rightly or legally made. When a Court has dismissed a suit on the ground that the defendant has appeared and the plaintiff has not appeared, that is a dismissal under section 102, and an application can be made under section 103 to set aside such a dismissal. The plaintiff's success upon that application depends on his ability to prove that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The defendant may, for the purpose of showing that no such cause existed, prove that, in fact, the plaintiff had appeared, and that he was not prevented by any sufficient reason from appearing at the hearing: but that is a question which must be determined for the purpose of considering whether the plaintiff has been able to substantiate his application under section 103 to set aside the dismissal. In this case, as has been shown in the judgment of the learned Chief Justice, the Court did, in fact, dismiss the suit on the ground that there was no appearance on behalf of the plaintiff. That being so, the plaintiff was entitled to apply under section 103 for the setting aside of that dismissal, and the Court below was wrong in refusing to entertain the application. I agree with the order proposed by the learned Chief Justice.

AIKMAN, J.—I also am of the same opinion. The learned Subordinate Judge says that the order of dismissal which was passed on the 25th November, 1898, amounted to a dismissal for want of proof. I am clear that this is a mistake. It would have been open to the Subordinate Judge in the present case to say that the evidence on the record was insufficient to prove the plaintiff's case, and that therefore the suit was dismissed. Had he said so, that would have been a decree against which the plaintiff's remedy would have been by way of appeal. But what he did say,

was that the suit was dismissed for default of appearance. That is clearly an order passed under the first part of section 157 read with section 102 of the Code, and the plaintiff adopted the proper course by applying under section 103 for an order to set the dismissal aside. The argument that because the Court may have been mistaken in thinking that there was no appearance by the plaintiff, the order must be taken to have been one not passed under section 102 is, in my opinion, utterly fallacious, and I would dissent from anything there may be in the judgments cited which would support such reasoning. I concur in the order proposed.

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Appeal decreed and cause remanded.

APPELLATE CIVIL.

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Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.
DHAN KUNWAR AND ANOTHER (OPPOSITE PARTIES) v MAHTAB SINGH
AND OTHERS (OBJECTORS) *

*Civil Procedure Code, Section 244—Execution of decree Sale in execution
Decree satisfied—Amendment of decree in favor of judgment-debtors
—Application by judgment-debtors to recover surplus from decree-holders*

Where by a sale in execution the decree as it stood at the time when execution was taken out had been fully satisfied, but the decree was afterwards amended at the instance of the judgment-debtors, and in consequence of the amendment the decree-holders were found to have realized more from the judgment-debtors than they were entitled to, it was *held* that it was competent to the judgment-debtors by application under section 244 of the Code of Civil Procedure to recover such surplus from the decree-holders.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment, which was as follows:—

“This appeal relates to a decree bearing date the 25th July 1895. Of that decree the ancestors of the present respondents

* Appeal No. 11 of 1899, under section 10 of the Letters Patent.

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were decree-holders, and the ancestors of the present appellants were the judgment-debtors against whom the decree ran. The decree was a decree for sale passed under section 88 of Act No. IV of 1882. The order absolute for sale had followed in due course, the property was sold, and the proceeds of the sale dealt with as provided by section 88. The amount due had been paid to the plaintiffs, when the judgment-debtors discovered that there was an error in the decree, applied for amendment and got the decree amended. The result of the amendment was the discovery that a sum of Rs. 500-11-4 had been paid to the plaintiffs in excess of what was due to them under the decree as now amended. The judgment-debtors then applied under section 244 of the Code of Civil Procedure to recover this sum in the execution department. Their application has been dismissed on the ground that the loss is due to the negligence of the appellants."

The single Judge thereafter proceeded to dismiss the appeal before him. The appellants appealed under section 10 of the Letters Patent.

Mr. D. N. Banerji and Babu Satish Chandar Banerji for the appellants.

Pandit Moti Lal Nehru, for the respondents.

STRACHEY, C. J., (BANERJI, J., concurring).—We are of opinion that this appeal must be dismissed. At the same time we are unable to concur in the view of the law on which the learned Judge has dismissed the appeal to this Court. The learned Judge's view was this. He considered that where there had been a sale in execution of a decree, and by that sale the decree as passed was fully discharged, but the judgment-debtor afterwards obtained an amendment of the decree, and the decree as amended showed that the decree-holder had realized at the sale more than he was entitled to, the judgment-debtor had no right under section 244 of the Code of Civil Procedure to apply to recover the excess realized. We cannot agree with that view at all. It appears to us that the question whether the decree-holder had realized more than he was entitled to under the decree as it finally stood, was undoubtedly

a question relating to the execution, discharge or satisfaction of the decree, and that therefore under section 244 the judgment-debtor was entitled to apply for the recovery of what the decree-holder had taken in excess. The learned Judge says:—"As soon as the decree ceased to subsist section 244 had no application." It would, we think, be impossible to maintain that after the sale in execution, the decree ceased to subsist in the sense that no amendment of it could be made, and if so the answer is that as soon as the decree was amended, and the amendment showed that the decree-holder had realized too much, the application of section 244 was revived. So long as there is no question which can be raised under section 244, that section, of course, could have no application; but as soon as any such question arises the section again becomes applicable. Take the converse case. Suppose that after the execution sale it appeared that the decree awarded less to the decree-holder than he was entitled to according to the judgment. Surely he could apply, notwithstanding the sale, for an amendment of the decree so as to entitle him to recover in execution the full amount decided in the judgment to be due to him, and, if the amendment were made, surely he could then execute his decree for the balance due, and any application for such execution would be made under section 244. If so, the judgment-debtor, in the converse case of too much having been realized, can equally apply for amendment and afterwards recover the excess under section 244. According to the principle laid down by the learned Judge, neither the judgment-debtor nor the decree-holder would have any remedy under sections 206 and 244, and a separate suit would be necessary, if it were discovered that too much or too little had been realized at the sale in consequence of a clerical or arithmetical error in the decree. Section 244 was intended to make a separate suit unnecessary in such cases.

On other grounds, however, we think that the appeal must fail. The whole question is whether the decree-holders in fact realized Rs. 500 odd in excess of what they were entitled to. That is a question of the construction of the decree for sale under section

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88 of the Transfer of Property Act. That decree provides for future interest. It does not expressly state that the future interest is payable until realization, but it does not state that it is to stop at any earlier date. Therefore, unless there is anything to preclude us from so doing, we must construe the decree according to the recent Full Bench ruling in *Bakar Sajjad v. Udat Narain Singh* (1), as a decree in accordance with section 88, that is, as a decree awarding interest until the date of realization. On that view of the decree the decree-holders have not realized too much, and this application of the judgment-debtors must fail. Then is there anything which does preclude us from applying the principle laid down by the Full Bench? The only thing which, it is suggested, precludes us is an order passed on the 4th of December, 1897, on the judgment-debtor's application, by which the Court amended, not the decree under section 88, but the order absolute for sale under section 89. Of course, the decree to be executed was the decree under section 88, and no alteration of the order absolute could affect the rights of the decree-holders under that unamended decree. But it is said that the amending order placed a construction on the decree under section 88 to the effect that interest beyond six months from the date of the decree should not be allowed. It is suggested that we are bound to construe the decree under section 88 according to that construction and not on the construction which would be right according to the Full Bench decision. We do not think that the order of December, 1897, has any such effect. It was not an order passed in execution proceedings, nor an interlocutory order which could have an effect analogous to that of *res judicata* in accordance with the well-known rulings of the Privy Council. At the time when it was made, execution proceedings had been completed by the sale. It was not until some time later that proceedings in execution were resumed by the present application under section 244. We do not think that the principle of the Privy Council rulings can be held to cover an

(1) (1899) I. L. R., 21 All., 361.

order of this kind. It is difficult, indeed, to say under what provision of the law the order was made. It cannot be regarded as an order under section 206 of the Code, because the Court did not profess to act on any ground stated in that section. Nor can it be regarded as an order of review. We think that the principle laid down in the Full Bench case must be applied; that the decree-holders did not realize anything in excess of what was due to them under the decree, and that this appeal of the judgment-debtors must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Banerji

ZUBEDA BIBI (DEFENDANT) v. SHEO CHARAN (PLAINTIFF.)*

Act No XII of 1881 (N.W P Rent Act), 30—Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction

Held, that the mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is as a trespasser.

THE plaintiff in this case was the purchaser of the rights of the mortgagor in certain property which was the subject of a usufructuary mortgage. The defendant, Zubeda Bibi, was the representative in interest of the mortgagees. The plaintiff redeemed the mortgage by deposit of the whole mortgage money in Court, and obtained possession of the mortgaged property with the exception of four plots of land on which the mortgagee during the continuance of the mortgage had planted trees. The plaintiff accordingly brought the present suit for the recovery of these four plots.

The Court of first instance (Munsif of Basti) decreed the plaintiff's claim. The defendant appealed and urged, *inter alia*, that the suit was not cognizable by a Civil Court because on a former occasion the plaintiff had sought to eject the defendant as

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*Second Appeal No. 196 of 1899 from a decree of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 31st December 1898, confirming a decree of Mr. H. David, Munsif of Basti, dated the 6th November 1897.

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a tenant by proceedings under the North-Western Provinces, Rent Act, 1881. This was so ; but in those proceedings the Board of Revenue had found that the relation of land-holder and tenant did not subsist between the parties, and had directed the plaintiff to seek his remedy in a Civil Court. The lower appellate Court (Subordinate Judge of Gorakhpur) dismissed the appeal confirming the decree of the Court of first instance.

The defendant thereupon appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the respondent.

BANERJI, J.—This is an untenable appeal. The plaintiff respondent is the purchaser of the rights of two persons who mortgaged certain property to the defendant appellant. The amount of the mortgage was deposited by him in Court, and was withdrawn by the mortgagee in full discharge of the mortgage. The mortgagee delivered possession to the plaintiff of the whole of the mortgaged property except a grove which is claimed in this suit. The Courts below have decreed the claim. The first contention urged in this appeal is that the suit is cognizable by a Court of Revenue and not by the Civil Court. That contention is based upon the argument that the plaintiff, by reason of his having applied to the Revenue Court for the ejectment of the defendant under section 36 of Act No. XII of 1881, is precluded from denying that the relationship of landlord and tenant exists between him and the defendant. It appears that the plaintiff did issue a notice for the ejectment of the defendant under section 36 of the Rent Act. That notice was contested, and in the result the appellate Court held that the plaintiff was not entitled to eject the defendant under the proceedings taken by him in the Revenue Court. The order of the Board of Revenue, which is the only order on the record of this case, is to the effect that the plaintiff ought to seek his remedy in the Civil Court. From that order it is clear that the Revenue Court did not find that the relation of landlord and tenant existed between the parties. The mere fact

of the plaintiff having applied to the Revenue Court for the ejectment of the defendant does not estop him from asserting, as he has done in the present suit, that the defendant is unlawfully in possession, that is as a trespasser. The application made by the plaintiff in the Court of Revenue did not amount to anything more than an admission which was rebuttable. In this case he asserted that the defendant, after having received the mortgage money, had no right to continue in possession of a part of the property, and that she was thus in possession as a trespasser. A suit brought upon such an allegation can only be brought in the Civil Court. It has been found that the relation of landlord and tenant does not exist between the parties. It was never stated in the pleadings that such relation subsisted between the parties. The only ground upon which the defendant contended in the Courts below that the suit was not cognizable by the Civil Court was the ground stated in the first plea in the memorandum of appeal to the lower appellate Court, namely the fact that the plaintiff had issued a notice of ejectment under section 36 of Act No. XII of 1881. Upon the allegations made in this case and the findings of the Court below this was a suit which was exclusively cognizable by the Civil Court. The lower appellate Court has found that the grove in question was planted during the time when the defendant was in possession as an usufructuary mortgagee, and that it is thus an accession to the mortgaged property. It has found that separate possession and enjoyment of the grove without detriment to the principal property is not possible. It has further found that the planting of the grove was not necessary to preserve the property from destruction, forfeiture, or sale, and that the grove was not planted with the consent of the mortgagor. Consequently under section 63 of the Transfer of Property Act the mortgagor is entitled to obtain delivery of possession over the accession made to the mortgaged property. It is true that the lower appellate Court in its judgment uses the word plaintiff when referring to the question of consent; but having regard to the fact that the Court in distinct terms referred

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to the provisions of the second paragraph of section 63, and that it was considering whether all the conditions mentioned in that section applied, it is clear that the Court meant to find that the grove was not planted with the consent of the original mortgagors. Upon the findings of the lower appellate Court the second contention raised in this appeal cannot be sustained. It is urged, lastly, that the plaintiff ought to have sued for redemption of the mortgage. It has been found, and it is a fact which was evidently admitted on the pleadings, that the defendant received the whole of the mortgage money in full satisfaction of the mortgage. That being so, there has been a redemption of the mortgage, and as the bulk of the property has been restored to the representative of the mortgagor, the only suit which the plaintiff, as such representative, had to bring was a suit for recovery of possession of the property which was withheld from him. I dismiss the appeal with costs.

Appeal dismissed.

1899
July 15.

Before Mr. Justice Blair and Mr. Justice Aikman.
DHANI RAM (DEFENDANT) v. CHATURBHUI AND ANOTHER
(PLAINTIFFS).*

Civil Procedure Code, section 244—Execution of decree—Questions for the Court executing the decree—Sale in execution—Suit by decree-holder and judgment-debtor against auction purchaser to set aside sale alleging an uncertified adjustment of the decree prior to the sale

Held, that the provision of section 244 of the Code of Civil Procedure disallowing a separate suit to determine questions arising between the parties to the suit in which a decree has been passed and bearing upon the execution thereof, operates not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. *Basti Ram v. Fattu* (1), and *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2) referred to.

* First Appeal from order No. 46 of 1899 from an order of W. F. Wells, Esq., District Judge of Agra, dated the 6th May 1899.

(1) (1886) I. L. R., 8 All., 146.

(2) (1892) I. L. R., 19 Calc., 683.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom *Munshi Gulzari Lal*) for the respondents.

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SENG.

PLAINT, J.—The plaintiffs' suit, out of which this second appeal arises, is a suit by a decree-holder and a judgment-debtor as plaintiffs against an auction purchaser at a sale in execution of a decree in which the plaintiffs occupied the position I have mentioned on the ground that an adjustment had been arrived at between them before sale. The Court of first instance dismissed the suit of the plaintiffs, applying the provisions of section 244 of the Code of Civil Procedure. The appellate Court reversed that decision and remanded the case under section 562 of the Code of Civil Procedure for decision upon the merits. It is against that order of remand that the present appeal is brought. The ground taken by Pandit *Sundar Lal*, who appears for the appellant, is that the Court of first instance was right in applying section 244 as a bar to this suit. That practically is the substantial ground of appeal. The fact alleged is, that the plaintiffs had really effected an adjustment, which, if duly certified to and sanctioned by the executing Court, would have put an end to the suit in the execution proceedings. It was manifestly the duty of the decree-holder under section 258 of the Code of Civil Procedure to certify such adjustment. It was open to the judgment-debtor, upon the decree-holder failing to perform that duty, to protect himself from the further execution of the decree by himself certifying to the Court the fact of such adjustment, whereupon due notice would have been given to the decree-holder to show cause why the adjustment should not be recorded as certified. As a matter of fact neither party took the course which is imposed upon one, and, in case of his default, is allowed to the other by that section. The consequence was that the sale proceeded and the defendant became a purchaser. It is now sought to set aside that sale. Apart altogether from authorities to

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which I am bound to conform, it does seem contrary to elementary principles of right and justice to allow two persons, either of whom could have prevented the sale, to put their hands in their pockets till the sale was over, and then to proceed against an innocent auction purchaser by suit in order to set aside the sale which ought never to have taken place. However, we have abundant authority in the Full Bench decision of this Court in *Basti Ram v. Fattu* (1), and the decision of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). The only distinction that appears to us which could possibly be urged between this case and those that have been decided is that the sole defendant here is the auction purchaser, and it has been contended before us that upon that fact the provisions of clause (c) of section 244 of the Code of Civil Procedure do not apply. In my opinion the question as to the fact and propriety of this adjustment did arise between the parties to the suit in which the decree was passed, and ought to have been by them decided in the executing Court as provided for by section 244. I would allow this appeal, and, setting aside the order of remand by the Court below, restore with costs the decree of the Court of first instance.

AIKMAN, J.— I am of the same opinion. The suit out of which this appeal arises was brought to set aside an auction sale held in execution of a decree on a mortgage. The plaintiffs are the decree-holder and the judgment-debtor in the mortgage suit. The defendant, who is the appellant here, is the auction purchaser of the mortgaged property. It appears from the statement of facts that on the 10th of March, 1898, the decree-holder and the judgment-debtor in the mortgage suit entered into an arrangement, whereby the judgment-debtor executed a fresh mortgage in favour of the decree-holder in adjustment of the decree which the latter had obtained upon the previous mortgage. Neither of the parties took any steps to have this adjustment certified to the Court, whose duty it was to execute the decree. For anything we know to the contrary, the agreement entered into between the decree-holder

(1) (1886) I. L. R., 8 All., 146.

(2) (1892) I. L. R., 19 Cal., 633.

and the judgment-debtor may have come within the provisions of the second paragraph of section 257A of the Code of Civil Procedure, and may have required the sanction of the Court. The 21st of March, 1898, was the date fixed for the sale which, under the provision of section 320 of the Code of Civil Procedure, had been transferred to the Collector. On that date the son of the decree-holder presented an application to the officer conducting the sale, asking him to stay the sale on the ground that the decree had been satisfied. That officer refused the prayer of the applicant. The property was sold, and was purchased by the appellant before us. The judgment-debtor applied under section 311 of the Code of Civil Procedure to have the sale set aside. That application was refused, and no appeal was preferred against the order of refusal. The Court of first instance held that the present suit was barred by the provisions of section 244 of the Code, and on that ground dismissed it. On appeal the learned District Judge came to the conclusion that section 244 did not apply to the case, set aside the decree of dismissal, and remanded the suit for decision on the merits. The defendant appeals against this order of remand, contending that the decision of the first Court was right. In my judgment the suit is clearly barred by section 244. The case is, in my opinion, governed by the decision of the Full Bench of this Court in *Bisti Ram v. Fattu* (1). That was a case in which a judgment-debtor, whose property had been sold in execution of a decree, brought a suit against the auction purchaser to have the sale set aside on the ground that the property, an occupancy tenure, could not be sold in execution. The Full Bench held that the provisions of section 244 disallowing a separate suit to determine questions arising between the parties to the suit in which a decree had been passed and bearing upon the execution, discharge or satisfaction of the decree, or stay of the execution thereof, operated not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the

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(1) (1886) I. L. R., 8. ALL., 143.

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decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to execution, discharge or satisfaction of the decree. If the question be of this nature in this suit it is one which by section 244 must be determined by order of the Court executing the decree and not by a separate suit, and it is immaterial whether the party did or did not raise it prior to the auction sale in execution proceedings. If he did not, "suit is not the remedy which the Legislature has provided." These remarks in my judgment apply clearly to the present case. A purchaser at an auction sale held in execution of a decree is entitled to take it for granted that questions as to whether the decree under execution is or is not barred by limitation, as to whether the property advertised for sale is or is not saleable under the decree, and as to whether the decree has or has not been satisfied, have been decided by the Court executing the decree. If a suit like the present were held to be maintainable against an auction purchaser, it would have a most injurious effect upon auction sales. If parties will not adopt the course provided by law for deciding whether a decree has or has not been satisfied, they cannot take advantage of their own laches and neglect of the law to harass an innocent auction purchaser. I concur in the order proposed.

Appeal decreed.

1899
July 26.

Before Mr. Justice Knor, Acting Chief Justice

MUHAMMAD BAQAR (DEFENDANT) v. MANGO LAL (PLAINTIFF) *

Limitation—Act No. XV of 1877 (Indian Limitation Act), Sec. vi art. 120

—Suit by auction purchaser of mortgaged property to cancel a perpetual lease granted by the mortgagor in contravention of a covenant in the mortgage.

During the continuance of a mortgage which contained a covenant against alienation of the mortgaged property, the mortgagor made a perpetual lease of that property. The mortgagee brought a suit on his mortgage, and

* Second Appeal No 777 of 1898 from a decree of Babu Baijnath, Rai Bahadur, Additional Judge of Saharanpur, dated the 5th July 1898, confirming a decree of Maulvi Shah Amjadullah, Munsif of Saharanpur, dated the 27th July 1897.

having obtained a decree, put the mortgaged property up to sale. The auction purchaser of the mortgaged property on becoming aware of the existence of the perpetual lease, sued for its cancellation and for a declaration that the defendant had no right to interfere with or obstruct the plaintiff in respect of the property in question. *Held*, that the limitation applicable to such suit was that prescribed by article 120 of the second schedule to the Indian Limitation Act, 1877, and not that prescribed by article 91 or article 95. The main prayer of the plaint was for a decree declaring and establishing the plaintiff's title and the prayer for cancellation of the lease could be treated as merely subsidiary to the main relief asked. *Pachamuthu v. Chinnappan* (1) and *Uma Shankar v. Kalka Prasad* (2) referred to. *Din Dial v. Har Narain* (3) followed.

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 MUHAMMAD
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 s.
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THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Muftaba*, for the appellant.

Mr. *B. E. O'Connor*, for the respondent.

KNOX, ACTING C. J.—The suit out of which this second appeal arise, was brought by one Mango Lal, who is now respondent, on the basis of a bond executed by Fazal Husain. The bond is said to have been executed on the 1st of July, 1889, in favour of the predecessor in interest of the plaintiff, and to have been followed by a second bond executed by the same person and in favour of the same ancestor of the plaintiff. On the 26th of January 1890, a suit was brought upon these bonds, and a decree obtained for the enforcement of the hypothecation lien on the 28th of March 1891. The plaint in that case was filed by the father of the present plaintiff. He died before the close of the suit. The plaintiff and his brother obtained a decree under section 89 of Act IV of 1882, on the 25th of June 1892, and in execution of the decree the entire hypothecated property was brought to sale. The plaintiff purchased the property when it was put up for sale, and the date of his purchase was the 20th of August 1894.

It appears that on the 7th July 1890, Fazal Husain executed a perpetual lease in respect of a portion of the hypothecated property in favour of Muhammad Baqar.

(1) (1887) I. L. R., 10 Mad., 213. (2) (1883) I. L. R., 6 All., 75.
 (3) (1893) I. L. R., 16 All., 73.

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The plaintiff contends that the execution of this lease was in contravention of a covenant not to alienate, which was contained in the mortgage deed executed by Fazal Husain in favour of Bhagwan Das, and accordingly prays in this suit that the lease be declared null and void.

The date on which the cause of action accrued is entered in the plaint as November 1896, and is set out as being a decision which the Revenue Court gave against the plaintiff when he tried to realize rent from his tenants and found himself opposed by Muhammad Baqar.

The learned Judge found that the suit was within time and rejected the defence set up by the appellant that limitation barred the claim. He also found that the lease was in contravention of the covenant contained in the mortgage-deeds of 1889 and 1890, and granted the respondent the decree prayed for.

It is now contended before me in appeal that the suit is barred by limitation, as the article which applies is either article 91 or 95 of the second schedule of Act No. XV of 1877. It is also contended that the respondent was aware of the lease on the 5th of July 1893, the date on which Mango Lal, plaintiff, in his defence filed by him in answer to a suit brought by one Musammât Saidunnisâ, expressly made mention of this lease, and time began to run from that date; and lastly, that, even if article 120 of the above named schedule is the article which governs the case, then also time began to run from the date of the execution of the lease, the 7th of July 1890, and in this event also the suit brought was beyond time.

The learned Judge held that the article which governs the suit was article 120 and the right to sue did not accrue to the plaintiff until he purchased the property in August 1894. In support of his judgment I have been referred to the case of *Pachamuthu v. Chinnappan* (1). The difficulty about applying that precedent is that in that suit there was no prayer that the deed which prejudiced the plaintiff's title might be cancelled

(1) (1887) I. L. R., 10 Mad., 213.

or set aside. I was also referred to the case of *Uma Shankar v. Kalka Prasad* (1). This is more in point, for the relief claimed by the plaintiffs was proprietary possessions by establishment of ownership and by removal of the defendants' opposition based on the collusive mortgage. The learned Judges in that case held that the suit was not for relief on the ground of fraud, but for possession of property by right of auction purchase. Similarly in the case before me the prayer is for a declaratory decree declaring and establishing the plaintiff's title, and also declaring that the lease of the 7th of July 1890, is null and void. I think the suit before me may be considered as one in which I should follow the principle laid down in the ruling just quoted of this Court. I find that my brother Aikman in *Din Dial v. Har Narain* (2), had a similar point to decide, and held that the prayer for the cancelment of the deed, which was in the plaint before him, could be treated as merely incidental to the main relief asked. In the present case I too would treat the subsidiary prayer in the declaration prayed for as purely subsidiary. What the plaintiff wants is a declaration that the shadow cast upon his title may be dispersed. It is otherwise nothing to him whether the lease between Fazal Husain and Muhammad Baqar is or is not binding upon those who were parties to it. Accordingly, following it, I dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

HAMID ALI SHAH (PLAINTIFF) v. WILAYAT ALI (DEFENDANT).^{*}
Act No. XII of 1881 (N.-W. P. Rent Act) sections 36, 96(b)—Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.

Held that the fact that a plaintiff in a civil suit for ejectment of an alleged trespasser has on a previous occasion taken proceedings against the

^{*} Second Appeal No 278 of 1899, from a decree of Rai Pandit Indar Narain, Subordinate Judge of Farrukhabad, dated the 10th January 1899, reversing a decree of Babu Hari Mohan Banerji, B.A., Munsif of Farrukhabad, dated the 31st August 1898.

(1) (1889) I. L. R., 6 All., 76.

(2) (1899) I. L. R., 16 All., 79.

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defendant under section 36 of the Rent Act, 1881, is not of necessity fatal to the suit in the Civil Court. *Baldeo Singh v. Imdad Ali* (1), and *Deo Narain Rai v. Sheo Charan Rai* (2) distinguished. *Zubeda Bibi v. Sheo Charan* (3) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Harendro Krishna Mukerji*), for the respondent.

AIKMAN, J.—This appeal arises out of a suit which was brought by the appellant to eject the defendant from certain plots of land as being a trespasser. The Court of first instance decreed the plaintiff's suit. The lower appellate Court reversed that decree and dismissed the suit upon the ground that it was not cognizable by the Civil Court. It appears that the plaintiff issued a notice to the defendant under section 36 of the North-Western Provinces Rent Act, 1881, seeking to eject him from the land in suit. The defendant made an application to the Assistant Collector contesting his liability to be ejected. He contended in this application that he was not the plaintiff's tenant, but was himself the owner of the land. The Assistant Collector came to the conclusion that the present plaintiff, Hamid Ali Shah, had proved his ownership of the land, and upon that finding maintained the notice of ejectment. The defendant appealed to the Commissioner, who pointed out that the finding of the Assistant Collector in favour of the plaintiff's ownership of the land was not sufficient to give the Revenue Court jurisdiction. The Commissioner held that the relation of landlord and tenant did not exist between the parties, and reversed the order of the Assistant Collector, holding that the case was "essentially one for the Civil Court." The learned Subordinate Judge refers to a decision of Burkitt, J., in *Baldeo Singh v. Imdad Ali* (1). That decision, I may mention, was followed by me in the case of *Deo Narain Rai v. Sheo Charan Rai* (2). But the circumstances

(1) (1893) I. L. R., 15 All., 189.

(2) Weekly Notes, 1893, p. 166.

(3) (1899) *supra*, p. 83.

of the cases dealt with in these two decisions were entirely different from those of the present case. The plaintiffs in both those cases had endeavoured to eject the defendant by taking action under section 36 of the Rent Act, but the Revenue Court had, on the defendant's objection, held that the defendant was a tenant with right of occupancy. Under these circumstances my brother Burkitt and I held that no suit was maintainable in a Civil Court to eject the defendant as a trespasser. That this view is right is quite evident from the provisions of section 96, clause (b) of the Rent Act, although that was not referred to in our judgments. The present case is on all fours with an unreported case decided by my brother Banerji—Second Appeal No. 196 of 1899, decided on the 12th July 1899.* In that case, as in this, the Revenue Court held that the relation of landlord and tenant did not exist between the parties. With the following passage of the judgment, I fully concur:—"The mere fact of the plaintiff having applied to the Revenue Court for the ejectment of the defendant does not estop him from asserting, as he has done in the present suit, that the defendant is unlawfully in possession, that is, as a trespasser."

In my judgment the suit was cognizable by the Civil Court. I therefore allow the appeal, and, reversing the decree of the lower appellate Court, remand the suit to that Court under the provisions of section 562 of the Code of Civil Procedure, with directions to readmit the appeal under its original number on the register, and proceed to dispose of the remaining grounds raised in the memorandum of appeal to it. The appellant will have the costs of this appeal. Other costs in the case will abide the event.

Appeal decreed and cause remanded.

* Since reported. *Vide supra*, p. 83.

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August 9.

Before Mr. Justice Knox and Mr. Justice Banerji.

BALBIR SINGH AND ANOTHER (PLAINTIFFS) v. THE SECRETARY OF
STATE FOR INDIA IN COUNCIL (DEFENDANT).*

*Construction of document—Grant of land—Presumption as to boundaries
where grant is described as bounded by a river or a road—Meaning of
“river.”*

If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption; and this, though the measurement of the property which is granted can be satisfied without including half the road or half the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road. And this rule of construction cannot be departed from merely because it is shown that it would have been to the interest of the grantor to retain half the bed of the river. This rule of construction applies equally whether the subject matter be a grant from the crown or a subject. *Micklethwaite v. Newlay Bridge Co.* (1), *Ecroyd v. Coulthard* (2), and *Lord v. The Commissioner for the City of Sydney* (3), followed.

THIS was a suit for the demarcation of the western boundary of the plaintiffs' estate. The plaintiffs were owners of two villages known as upper and lower Ghamandpur. These villages originally formed part of a Government grant of land made to the widow of Captain William Raynor, V. C., and one of the boundaries of that grant, the boundary in question in the present suit, was the bed of a hill stream called the Jakhan Rao. The plaintiffs claimed that the original grantee was in possession of the Jakhan Rao up to the line of mid-stream, the western boundary of the grant being described as the Jakhan Rao. They claimed that possession of the villages purchased by them had been always held according to the boundary alleged. The plaintiffs did indeed admit that in 1883 the Forest Department set up boundary pillars on the east bank of the Jakhan Rao and that on a dispute arising as to the boundary the question had been decided against

* First Appeal No. 96 of 1896 from an order of B. Lindsay, Esq., Subordinate Judge, Dehra Dun, dated the 14th December 1895.

(1) (1886) L. R., 33 Ch. D., 133.

(2) L. R., 1897, 2 Ch. D., 554.

(3) (1859) 12 Moo., P. C., 473.

them by the Collector, but they claimed to have always remained in possession notwithstanding that decision and that the Collector's order could not affect their rights. The defendant pleaded that ever since the erection of the boundary pillars on the left bank the Forest Department had been in possession, and that the suit was barred by limitation. It was denied that any portion of the Jakhan Rao was included in the original grant and it was further alleged that the plaintiffs' predecessors had compromised her claim to the Rao by accepting an additional grant of 400 acres.

The Court of first instance (Subordinate Judge of Dehra Dun) dismissed the plaintiffs' suit, holding that the presumption as to the boundary being the middle line of the bed of the Jakhan Rao, applied only in cases where Government makes no claim to the soil of a river bed—not in cases like the present where the Government claims the whole of the river bed as of right and as being the proprietor of all the land in Dehra Dun. The Court also found that the area of the original grant would be made up without including half the bed of the Jakhan Rao, and that therefore the boundary set up by the defendant was correct.

The plaintiffs appealed to the High Court.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the appellants.

Mr. *E. Chamier* and Mr. *A. E. Ryves*, for the respondent.

KNOX and BANERJI, JJ.—The plaintiffs-appellants are the owners of certain villages in the district of Dehra Dun, which originally formed part of a grant made by Government to the widow of Captain Raynor in 1865. To the west of those villages lies a hill stream called the Jakhan Rao, and to the west of the stream is a forest belonging to Government.

It is alleged on behalf of the plaintiffs that the western boundary of their villages extends to the mid-stream of the Jakhan Rao, and that they are thus the owners of one-half of the bed of the stream. On behalf of the defendant it is asserted that the western limit of the plaintiffs' villages is the eastern bank of the Jakhan Rao, and that the whole of the bed of that stream belongs

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to the Government. An order to that effect was passed by Mr. Church, Superintendent of Dehra Dun, on the 26th February 1883.

The present suit has been brought by the plaintiffs to have the western limit of their grant determined, and for a declaration that their property extends to the mid-stream of the Jakhan Rao.

The defendant denied the title set up by the plaintiffs and pleaded limitation.

The Court below has dismissed the claim.

The sanad of grant in favour of Mrs. Raynor is printed on page 5 of the appellants' book, and is dated the 3rd of August 1865. By it the Government of the North-Western Provinces, "in consideration of the good services performed by the late Captain William Raynor, V. C., of the Veteran Battalion, one of the gallant defenders of the Delhi Magazine in 1857," granted to "his widow and to his heirs, representatives and assigns, the proprietary right rent-fee in perpetuity in the tract of land measuring 2,000 acres." The boundaries of the land are specified, the western boundary being "Jakhan Rao."

It is contended on behalf of the plaintiffs that the legal effect of this conveyance was to pass to Mrs. Raynor the bed of the Jakhan Rao *usque ad medium filum*.

The rule of law on the subject was laid down by Cotton, L. J., in the well-known case of *Micklethwaite v. Newlay Bridge Co.* (1), in the following terms:—"In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances, or enough in the expression of the instrument to show that that is not the intention of the party. It is a presumption that not

(1) (1886) L. R., 33 Ch. D., 133 at p. 145

only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted." This rule has been followed in subsequent cases, of which we may only mention the recent case of *Ecroyd v. Coulthard* (1). The Court below refused to apply it to the present case on the ground that it is not applicable to a case in which the Crown lays claim to the soil of the bed of a river. We are unable to agree with this view which the learned counsel for the respondent has conceded to be erroneous. In *Lord v. The Commissioner for the City of Sydney* (2), it was held that the grant by the Crown of land bounded by a creek passed the soil of the creek *ad medium filum aquæ*, and that this rule "equally applies, whether the subject-matter be a grant from the Crown or a subject." And the rulings to which the learned Judge has referred do not lay down a different view.

It was, however, contended on behalf of the respondent that the Jakhan Rao was not a river, and that the rule of mid-stream did not apply to it. With reference to this contention which, we may observe, was not raised in the Court below, we referred certain issues to that Court. Upon the findings on those issues the Jakhan Rao must be held to be a river. It has a perennial source, a bed and well-defined banks on either side: water flows in it for a part of the year, and it discharges itself in a continuous flow into another river, the Suswa. It has thus all the elements which constitute a river to which riparian rights attach. The water, it is true, dries up, and the bed remains dry for several months in the year, but it is not necessary that "water should flow in it continually." (See Tagore Law Lectures on the Law of Riparian Rights, p. 81, and the authorities cited therein). We therefore hold that the Jakhan Rao is a river. It is so described in the *wajib-ul-arzes* of the villages through which it passes. It was treated as such in the reports of the revenue officers, and the parties and the Court below proceeded on

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(1) L. R., 1897, 2 Ch. D., 554.

(2) (1859) 12 Moo, P. C., 473.

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the assumption that it is a river. It is too late therefore now to contend that the presumption of law which arises in the case of rivers does not apply to the Jakhan Rao.

The presumption that by a conveyance of land abutting on a river the bed of the river *ad medium filum* passes to the grantee may no doubt be rebutted, but do any circumstances exist in this case which rebut the presumption? The circumstances relied upon are, that the quantity of land granted is specified in the grant; that when the land was measured and entered in the khasra the bed was not included in the measurement; that in some of the maps the bed was not shown as a part of the grant; that as the bed yields lime-stones, which are a valuable source of income, it would have been to the interest of the Government to retain the bed and it is not likely that it was intended to be conveyed by the grant. All these arguments are fully met by the observations made by Lopes, L. J., and Cotton L. J., in *Micklethwaite v. Newlay Bridge Co.* Lord Justice Lopes said:—"If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this, though the measurement of the property which is granted can be satisfied without including half of the road or half of the bed of the river; and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road." And Cotton, L. J., observed:—"When the rule is once established as a rule of construction, we are not at liberty to depart from it merely because it is shown that it would have been to the interest of the vendor to retain the half of the bed of the river." As in that case, so in this, there is nothing in the language of the sanad, or in the nature of the property, or in the surrounding circumstances to exclude the presumption of a grant of a half of the bed of the Jakhan Rao to Mrs. Raynor.

On the contrary, it appears from a memorandum, dated the 14th April 1874, on the recently settled boundaries in the Dun Forests, forwarded by the Conservator of Forests to Captain Bailey, Superintendent, Forest Surveys, that it was declared by the Forest authorities that "the centre of the Jakhan Rao constitutes the boundary between the Government forests and the several grants." (*cf.* appellant's book, p. 17). It was urged by the learned counsel for the respondent that had it been intended to make a grant to Mrs. Raynor of any portion of the bed of the Jakhan Rao, the Forest Officers would not have raised objections, so far back as 1877, and asserted that the western boundary of the grant was the eastern bank of the Rao. This argument has no doubt much force, and it derives support from the correspondence printed on page 17 of the appellants' book. It must, however, be remembered that the grant had been made twelve years before, *i. e.*, in 1865. In 1871, Mrs. Raynor asserted that her boundary extended into the bed of the Jakhan, and that she had been taking lime-stones from it for five years preceding the date of her letter. It has been proved by the oral evidence adduced in the case, and specially by that of Mr. Raynor, that pillars were erected shortly after the grant along the middle of the bed of the river, and that lime-stones were appropriated by Mrs. Raynor and her son. The statement of Mr. Reynolds that permission was obtained from Forest Officers by Mrs. Raynor for burning lime is contradicted by that evidence. The inability of Mr. Reynolds to produce any application for permission very much weakens his statements (see correspondence, p. 11, respondent's book). Mr. Reynolds has admitted in his deposition that he was not aware of any facts which would prove actual possession of the Rao. The same may be said of the evidence of the other witnesses for the defendant. It has been fully established that in spite of the objections of the officers of the Forest Department, Mrs. Raynor and her successors in title remained in possession of the bed of the Rao, and prevented Government contractors from taking lime-stones from it. The possession of Mrs. Raynor is

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admitted, even in Mr. Church's order of the 26th of February 1883 (pp. 18 and 19, appellants' book). We are unable to agree with Mr. Ryves' contention that this order operates as *res judicata*. We are not satisfied on the evidence that the plaintiffs or their predecessors have been out of possession, that the defendant has been in adverse possession, and that the claim is beyond time.

A faint attempt was made to show that Mrs. Raynor relinquished all claim to the bed of the Jakhan Rao on obtaining 400 acres of land. But there is no satisfactory evidence to connect the grant of the 400 acres with the claim to the land now in question. Mr. Raynor has stated that it had reference to another claim which his mother had against Government.

We hold that the western boundary of the plaintiff's property is the centre of the bed of the Jakhan Rao, and that the plaintiffs are entitled to a declaration to that effect.

We allow the appeal, set aside the decree of the Court below, and decree the claim with costs in both Courts.

Appeal decreed.

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August 9.

Before Mr. Justice Know and Mr. Justice Aikman.

QURBAN HUSAIN (PLAINTIFF) v. CHOTE AND OTHERS (DEFENDANTS).*

Muhammadian Law—Pre-emption—Shias and Sunnis—Pre-emption claimed on ground of vicinage—Vendors and vendee Sunnis, pre-emptor a Shia.

Held that a Muhammadian of the Shia sect could not maintain a claim for pre-emption based on the ground of vicinage under the Muhammadian law when both the vendors and the vendee were Sunnis. *Gobind Dayal v. Inayat-ullah* (1), and *Pir Bakhsh v. Sughra Bibi* (2), referred to.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Maulvi Karamat Husain for the appellant.

Maulvi Ghulam Mujtaba for the respondent.

* Second Appeal No. 193 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 17th December 1896, confirming a decree of M. Muhammad Shah, M.A., Munsif of Aligarh, dated the 30th March 1896.

(1) (1885) L. L. R., 7 All., 775.

(2) Weekly Notes, 1892, p. 34.

AIKMAN, J.—This appeal arises out of a suit brought to enforce a right of pre-emption based on Muhammadan law and custom.

The plaintiff's suit was dismissed by the Court of first instance, which held that the plaintiff had no right to pre-empt the property sold. This decision was, on appeal, affirmed by the Subordinate Judge.

The plaintiff comes here in second appeal and the sole question for decision is whether, under the circumstances of the case, the plaintiff-appellant has a right of pre-emption in respect of the property sold.

The plaintiff and the vendors are neighbours residing in the town of Koil in which the house property sold, and claimed in this suit, is situated. The plaintiff claims to be allowed to pre-empt the property sold on the ground of vicinage. The plaintiff is a Shia governed by the Imamiya Law, whereas the vendors are Sunnis governed by the Hanifea law. The vendee is also a Sunni. Now by the Imamiya law, a neighbour, as such, has no right of pre-emption. It is admitted by the learned counsel who appears in support of the appeal that the plaintiff in this case might sell his house to anyone he likes, and that his Sunni neighbours could not successfully assert any right of pre-emption against him. But it is argued that, as according to the doctrines of the Sunni school, neighbours have a right of pre-emption, the plaintiff being a neighbour is entitled to take advantage of this right, even though he is not a Sunni. It is admitted by the learned counsel on both sides that in disposing of this case the Court ought to be guided by the rule of justice, equity and good conscience. But whilst one side argues that it would be in accordance with that rule to let the plaintiff have the benefit of the law governing the defendant-vendor, the other side contends that it would not be consonant with that rule to do so.

Very learned and able arguments were put forward by the counsel on either side in support of their respective positions. I do not propose to follow them in these arguments. For, admitting the appellant's contention that the case should be governed by

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the law of the school to which the vendor belongs, the learned counsel for the appellant has failed to satisfy me that, according to the doctrines of that school, a neighbour against whom a Sunni has no right of pre-emption has nevertheless a right of pre-emption against the Sunni. In my judgment the principle of reciprocity lies at the root of the law of pre-emption.

It is true that according to the Hanifeea law it is not necessary that the pre-emptor should be of the same religion as the vendor. On p. 477 of Baillie's Digest, 2nd edition, that learned author says:—"Islam on the part of the pre-emptor is not a condition." He goes on to say, "so that *zimmees* (*i. e.*, infidels subject to and under the protection of a Muhammadan Government) are entitled to exercise the right of pre-emption *as between themselves* or against Mooslims." Those words *as between themselves* are to my mind an indication that though a person need not be of the same religion as the vendor to entitle him to take advantage of the Hanifeea law of pre-emption, he must yet belong to a class of persons against whom a right of pre-emption can be enforced.

At p. 793 of his exhaustive judgment in the Full Bench case *Gobind Dayal v. Inayat Ullah* (1) Mahmood, J., observes:—"The rights and obligations created by that law (*i. e.*, the Muhammadan law of pre-emption), as indeed by every other system with which I am acquainted, must necessarily be reciprocal." It has not, I repeat, been shown to my satisfaction that it was ever the intention of the Hanifeea law to confer a right of pre-emption on a neighbour regardless of the fact that no reciprocal right could be enforced against him.

The case relied on by the lower Courts, namely, *Pir Bakhsh v. Sughra Bibi* (2), differs from the present case, for there the plaintiff and the vendor were both Shias, whilst the vendee was a Sunni. But the following observation of the learned Judge who decided that case appears to me to be in point:—"I do not think that any rule of justice, equity and good conscience exists that

(1) (1885) I. L. R., 7 All., 775.

(2) Weekly Notes, 1892, p. 34.

would enable us to allow the plaintiff, who from the fact of her being a Shia necessarily abhors the doctrines of the Sunai school, to take advantage of the law of that school in regard to pre-emption, and to maintain the pre-emption suit, any more than if the plaintiff stood in the position of the defendant-vendee she could be made liable to the doctrines of the Sunni school if the present vendee stood in the position of the plaintiff pre-emptor." For the above reasons I am of opinion that this appeal cannot succeed, and I would dismiss it with costs.

KNOX, J.—I also am of opinion that this appeal must be dismissed. The plaintiff, now appellant, is a Muhammadan gentleman of the Shia faith. He says in his plaint that he has a right of pre-emption under the Muhammadan law and custom in respect of the house sold, the subject-matter of the suit.

The appellant has not proved the custom alleged, and the sole question is whether he has any right of pre-emption under the Muhammadan law.

Now if by the Muhammadan law the plaintiff means the Imamiya doctrines, he has no standing, and he sees this, and therefore urges that the decision should be in accord with the doctrines of Abu Hanifa, and if not with these, still under the general rule of justice, equity and good conscience, which he considers would award him his claim.

His learned counsel addressed us very able arguments on this view of the question, but I think the question must be decided upon the general principles of Muhammadan law.

The appellant is claiming what has been properly described as a weak right. He is trying to place a restriction upon liberty of transfer of property. It is for him to show that he is vested with some right or power to make such restrictions. The Shia law gives him—a Shia—no such right under the present circumstances, and it is for him to show us that he can take advantage of the Sunni law, which he would be the first to repudiate did it place any similar restriction upon himself. As he has shown no law or precedent to the above effect, I would hold that he has not proved

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the existence of any such right of pre-emption in himself, and would dismiss the appeal with costs.

ORDER.—Appeal dismissed with costs.

Appeal dismissed.

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November 7.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair and Mr. Justice Burdett.

QUEEN-EMPRESS v. ADAM KHAN AND ANOTHER.*

Procedure—Complaint—Criminal Procedure Code, Section 203—Dismissal of complaint—Subsequent complaint arising out of the same matter.

When a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it *Nilratan Sen v. Jogesh Chundra Bhattacharjee* (1) and *Komal Chandra Pal v. Gourchand Audhikari* (2) followed *Queen-Empress v. Puran* (3) and *Queen-Empress v. Umedan* (4) referred to.

THIS was a reference, under section 438 of the Code of Criminal Procedure, made by the Superintendent of Dehra Dun through the Sessions Judge of Saharanpur. One Hira Lal brought a complaint against Adam Khan and Pandey Khan under section 406 of the Indian Penal Code in the Court of an Honorary Magistrate. The Magistrate took the complainant's statement and dismissed the complaint under section 203 of the Code of Criminal Procedure. The complainant then made a similar complaint arising out of the same circumstances against the same men in the Court of a Deputy Magistrate. The Deputy Magistrate entertained the complaint and issued warrants for the arrest of the accused, who were put in the lock-up.

The case being brought to the notice of the Magistrate of the District, he made the present reference to the High Court with a view to having the order of the Deputy Magistrate set aside.

Mr. C. Dillon, in support of the reference.

Pandit *Moti Lal* (for whom Babu *Durga Charan Banerji*), for the complainant, Hira Lal.

* Criminal Reference No. 463 of 1899.

(1) (1896) I. L. R., 23 Calc., 983.

(2) (1897) I. L. R., 24 Calc., 286.

(3) (1886) I. L. R., 9 All., 85.

(4) Weekly Notes, 1895, p. 86.

BLAIR and BURKITT, JJ.—This case has been referred to a Divisional Bench upon the ground of the extreme probability that similar cases occur and are likely to occur with great frequency, and it is therefore important that there should be a clear decision of this Court upon the point at issue. The case comes before us upon a reference from the District Magistrate of Mussoorie, forwarded through the Sessions Judge of Saharanpur. It contains a recommendation that the proceedings in the Court below should be set aside as illegal.

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The facts are that one Hira Lal lodged a complaint before a Bench of Honorary Magistrates at Mussoorie against Adam Khan and others, charging them with criminal breach of trust under section 406 of the Indian Penal Code. The Bench after examining the complainant dismissed the complaint upon the ground that the matter complained of was one which ought to be tried in a Civil and not in a Criminal Court. At a later period the same Hira Lal preferred precisely the same complaint in the Court of another Magistrate, who thereupon took cognizance of it and issued warrants for the arrest of the accused. The warrants were executed. The accused were taken into custody, and remained there for a month before they were liberated by an order of a superior Court. It is upon the petition of the person so imprisoned that this reference, with the recommendation of the District Magistrate, has been forwarded to us. Mr. Dillon, who appears to support the recommendation, has cited to us two recent rulings of the High Court at Calcutta: one *Nilratan Sen v. Jogesh Chundra Bhuttacharjee* (1) and the other *Komal Chandra Pal v. Gour Chand Audhikari* (2) which simply follows the ruling in the previous case. We have also been referred by Mr. Dillon to a recent unreported decision of this Court in *Karim Bakhsh v. Adul Khan*, decided by Mr. Justice Aikman on the 17th of June of the present year. The facts in the Calcutta cases are on all fours with those in the case which we have to decide. The rule laid down in those cases appears to us to be founded upon thoroughly satisfactory

(1) (1896) I. L. R., 23 Calc., 933.

(2) (1897) I. L. R., 24 Calc., 286.

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reasons. The facts in the case decided by our brother Aikman in no way resemble those in the Calcutta cases, and our brother Aikman's decision is not inconsistent with the rule laid down in them. On the other hand, we have had cited to us the case of *Queen-Empress v. Puran* (1) and the case of *Queen Empress v. Umedan* (2), in which it has been held that a Magistrate who has dismissed a complaint is not thereby precluded from himself entertaining again what is in substance the same complaint. That is the only authority upon which Mr. *Durga Charan* relies. It does not, in our opinion, conflict with the rulings either of the Calcutta Court or of our brother Aikman. We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority. For these reasons, we accept the recommendation of the District Magistrate and set aside the proceedings pending in the Court below. We desire it to be distinctly understood that we decide nothing except the question actually raised by the facts in this case, which is, that when a competent tribunal has dismissed a complaint, another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it.

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November 10.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.
DAULAT SINGH AND ANOTHER (DEFENDANTS) v. JUGAL KISHORE
(PLAINTIFFS).*

Execution of decree—Civil Procedure Code, section 244—Question “arising between the parties to the suit”—Sale of property by the Collector as ancestral property—Suit to set aside sale on the ground that property was not ancestral.

Certain property of a judgment-debtor having been sold by the Collector acting under section 320 of the Code of Civil Procedure as being ancestral

* Second Appeal No 937 of 1896 from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 3rd August, 1896, confirming decree of Babu Shiva Charan Lal, B. A., Munsiff of Nagina, dated the 27th May 1896

(1) (1886) I. L. R., 9 All., 85. (2) Weekly Notes, 1895, p. 86.

property, the judgment-debtor sued the decree-holder and the auction-purchaser to have the sale set aside upon the two main grounds that the property was not ancestral, and therefore could not legally be sold by the Collector, and that the real purchaser at the auction sale was the decree-holder himself who had not obtained the leave of the Court to bid. *Held* that the questions thus raised were questions arising between the parties to the suit within the meaning of section 244 of the Code of Civil Procedure and that the suit would not lie. *Basti Ram v. Fattu* (1) and *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2), referred to.

THE facts of this case are sufficiently stated in the judgment of the Chief Justice.

Maulvi *Ghulam Mujtaba*, for the appellants.

The respondents were not represented.

STRACHEY, C. J.—The plaintiff in this case claims to recover certain immoveable property, which was sold by the Collector in execution of a decree transferred to the Collector for execution under the rules made under section 320 of the Code of Civil Procedure, from the second defendant, who was the purchaser at that sale. The plaintiff was the judgment-debtor: the first defendant is the decree-holder: and the object of the suit is to recover possession of the property, notwithstanding the execution sale, on the ground that the sale by the Collector was vitiated by certain defects. After a remand made by the lower appellate Court to the Court of first instance, both Courts have decreed the claim. The question raised by this appeal on behalf of the defendants is whether the suit will lie.

Now the first ground on which the suit is based is that the property in question was not ancestral property, and that consequently the decree ought not to have been transferred for execution to the Collector. Before making its order of transfer the Civil Court, in accordance with the rules made by this Court, issued notice to the decree-holder and the judgment-debtor for the determination of the question whether the property was ancestral or not. The judgment-debtor the present plaintiff, did not contest that application, and the order for transfer was thereupon made. It is clear, therefore, that the question whether the

(1) (1886) I. L. R., 8 All., 146. (2) (1892) I. L. R., 19 Cal., 683.

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property was ancestral or not was a question arising between the parties to the suit—the decree-holder and the judgment-debtor. That being so, the present suit, so far as this first point is concerned, is barred by section 244 (c) of the Code of Civil Procedure, having regard particularly to the interpretation placed on that clause by the Full Bench of this Court in *Basti Bam v. Fattu* (1). It was there pointed out that the section prohibits not only a separate suit between the parties to the decree or their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of a decree, the object of which is to determine a question which properly arose between the parties or their representatives, and which relates to the execution, discharge, or satisfaction of the decree. As I have already stated, the question whether this property was ancestral did arise between the parties to the suit. It clearly related to the execution of the decree, because on it depended the Court which should have jurisdiction to execute the decree and the procedure by which the decree should be executed. The Full Bench decision to which I have referred is supported by the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2), decided by their Lordships of the Privy Council. For these reasons it appears to me that, so far as the suit is based upon an allegation that the property was being wrongly treated as ancestral for the purposes of execution, it is barred by section 244 of the Code.

The second ground upon which the suit is based is that the auction-purchaser in this case in execution of the decree, although nominally the second defendant, who is the son of the decree-holder, was really the first defendant, the decree-holder himself, and that as the purchase by the decree-holder was without the permission of the Court, it was in violation of section 294 of the Code. As to that it is sufficient to say that this question too falls within section 244 of the Code, because, on the plaintiff's own showing, it is a question arising between the parties to the suit and relating

(1) (1886) I. L. R., 8 All., 146.

(2) (1892) I. L. R., 19 Cal., 683.

to the execution of the decree. So far as regards the second point, therefore, the suit is also barred by section 244.

The third point raised by the suit is that the sale was effected by the Collector in disregard of an order directing the postponement of the sale passed by the Munsif who had transferred the execution of the decree to the Collector. As to that it is sufficient to say that no such order of postponement could be legally made by the Munsif. The execution having been transferred to the Collector, the Munsif, so long as it remained with the Collector, had no power to interfere with the proceedings, as by postponing the date of sale: only the Collector himself could do that.

These are the only grounds on which the suit has been brought. It follows from what I have said that the suit ought to have been dismissed. This appeal is allowed, the decrees of the Courts below set aside, and the suit dismissed with costs in all Courts.

BANERJI, J.—I am of the same opinion.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

W. J. ELLIS (APPLICANT), v. THE MUNICIPAL BOARD OF MUSSOORIE
(OPPOSITE PARTIES).*

Act No. XV of 1883 (N.-W. P. and Oudh Municipalities Act), Section 46—Issue of distress warrant for recovery of alleged arrears of Municipal tax—Jurisdiction of Magistrate.

Held that where a Magistrate, acting under section 46 of Act No. XV of 1883, issues a warrant for the realization of arrears of Municipal taxes alleged to be due, the Magistrate is acting in a ministerial capacity only and has no jurisdiction to inquire as to whether such arrears are really due or not.

THIS was an application for revision arising out of the following circumstances. The Secretary of the Municipal Board of Mussoorie wrote to the Magistrate of Mussoorie, on the 2nd May 1899, stating that a sum of Rs. 135-9-9 was due from one W. J. Ellis, Esq. of Kenneth Lodge Mussoorie on account of Municipal taxes from 1894 to 1898, and requesting the Magistrate to realize such amount under section 46 of Act No. XV of 1883.

* Criminal Revision No. 438 of 1899.

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DATTAL
SINGHv.
JUGAL
KISHORE.

1899

August 18.

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Orders were thereupon issued by a Magistrate of the first class to the police for the realization of the sum in question, no intimation of the application of the Board having apparently been given to the alleged defaulter. Mr. Ellis declined to pay the sum demanded and applied to the High Court for revision of the Magistrate's order for realization of the said sum. The main grounds of the application were that no arrears of any tax imposed under Act XV of 1883 were due by the applicant to the Municipal Board and, that no opportunity was given to the applicant to show cause why distress should not be levied on his property. Applicant's counsel relied on *Municipality of Ahmedabad v. Jumna Punja* (1).

Mr. W. Wallach for the applicant.

The Government Pleader (for whom Munshi Gulzari Lal) for the Municipal Board.

BLAIR, J.—In this case a Municipality has levied a tax; it has charged the present applicant with certain arrears alleged to be due. It has applied to a Magistrate for recovery of those arrears by distress and sale of the movable property of the applicant. Under protest payment was made. The applicant here challenges the right of the Magistrate to make such an order, and contends that the Magistrate ought to have judicially heard and determined the question whether any such arrears were due at all. The action which was taken by the Municipality and the Magistrate was apparently taken under section 46 of Act No. XV of 1883. That section is couched in the following words:—"Arrears of tax imposed under this Act may be recovered, on application to a Magistrate having jurisdiction within the limits of the Municipality, by the distress and sale of any movable property belonging to the defaulter within those limits." There are no provisions indicating that the Magistrate is applied to in a judicial capacity, and no provision for a judicial dealing with the case by him. I do not find my mind influenced by a decision cited from I. L. R., 17 Bom., 731, because that decision was upon a section of an Act containing words which did import a judicial determination. Nor do I find myself able to draw any inference from the statutory provisions

(1) (1891) I. L. R., 17 Bom., 731.

for the enforcement of the recovery of income tax or land revenue. It seems to me that, had the Legislature intended to impose upon the Magistrate the duty of judicial inquiry and finding, it would have used appropriate words. In the absence of such words I find it impossible to believe that the Legislature intended to confer upon the youngest and most inexperienced officer a function of trying such a question, for instance, as the legality of the imposition of a tax.

In my opinion the duty imposed on the Magistrate is purely ministerial, and provides the means whereby the recovery of the taxes could be enforced by a legal authority. This petition is therefore dismissed.

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W. J. ELLIS
v.
THE
MUNICIPAL
BOARD OF
MUSSOORIE.

Before Mr. Justice Knox and Mr. Justice Aikman
QUEEN-EMPRESS v NANNI AND OTHERS *

Act No. XLV of 1860 (Indian Penal Code), sections 268, 290—Public nuisance—Soliciting for purposes of prostitution.

Held that the soliciting for purposes of prostitution of passers by on a public road is not a public nuisance as that term is defined in section 268 of the Indian Penal Code.

1899

November 6.

THIS was a reference made under section 433 of the Code of Criminal Procedure by the Sessions Judge of Shahjahanpur. Three persons, prostitutes, being on a public road in Shahjahanpur about midnight, accosted a person who was going along the road and solicited him to go with them. The person thus accosted, being a Reserve Inspector of Police, caused the three women to be taken into custody, and they were tried for and convicted of the offence punishable under section 290 of the Indian Penal Code, *viz.*, a public nuisance. The accused applied for revision of their convictions and sentences to the Sessions Judge, who, being doubtful whether the acts complained of could properly be regarded as constituting a public nuisance, as that term is defined in section 268 of the Indian Penal Code, referred the case to the High Court. On this reference the following orders were passed.

KNOX, J.—This is a reference by the Sessions Judge of Shahjahanpur. The District Magistrate at Shahjahanpur has convicted three persons, prostitutes, of an offence which he

* Criminal Reference No. 345 of 1899.

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QUEEN-
EMPRESS
v.
NANNI.

considered they have committed under section 290 of the Indian Penal Code. The evidence against them shows that all three came out on to a public road, and, thinking that a Reserve Inspector of Police, who was passing by, was a soldier, called out to him and solicited him to go back with them. The District Judge before whom the case was taken in an application in criminal revision was doubtful whether an annoyance caused in a public place to a single person could be brought under the definition of a public nuisance, or the ground that it might have been any member of the public to whom the annoyance was caused. He has accordingly submitted the case to this Court under section 438 of the Code of Criminal Procedure. Section 290 renders punishable what are known as public nuisances in the Indian Penal Code. The definition of public nuisance is to be found in section 268. A person is guilty of a public nuisance when (omitting that part of the section which does not refer to the present case) he does an act which must necessarily cause annoyance to persons who may have occasion to use any public right. Acts of a similar kind, and more particularly the act of loitering or importuning for the purpose of prostitution, can be provided against in Cantonments by the Cantonments Act of 1889. Further, a Municipal Board may, under Act No. XV of 1883, make rules for prohibiting, preventing, and punishing such acts within the Municipality as may, in the opinion of the Board, cause, or tend to cause, annoyance to persons who have occasion to use a public right. The language used in Act No. XV of 1883 at once shows the difference between the powers given to a Municipal Board and the powers given to Magistrates under section 290 of the Indian Penal Code. In the latter case the act done is only punishable when it is an act which must necessarily cause annoyance to persons who have occasion to use any public right. We are not at the present moment considering acts or omissions which are the cause of common injury, danger, or annoyance to the public, or to the people in general, who dwell or occupy property in the vicinity. The difficulty in the present case lies in the words "must necessarily" which occur in section 268. The Magistrate was satisfied that in the present case annoyance was caused, at least so we learn from the remarks which he

has sent up to this Court along with the reference, and there can be no doubt that annoyance is frequently caused by acts of this kind. We are not satisfied that the act of the women in this case was one which must necessarily have caused annoyance. If the act, of which these women were found guilty, was an act entirely without a remedy, it might be necessary to call attention to the absence of all remedy. All that need be done in the present case is to say that the Sessions Judge is so far right when he says that the act does not fall within section 290 of the Indian Penal Code. The conviction will have to be set aside, and the fines, if paid, be refunded to the person or persons who paid them.

AIKMAN, J.—I am of the same opinion. In my judgment persons who are exercising the right of passing along a public road ought to be protected from being importuned for the purpose of prostitution. Within the limits of Cantonments such protection may be afforded by rules framed under section 26, clause 23, of the Cantonments Act of 1889; similarly within the limits of Municipalities, protection may be afforded by rules framed by Municipal Boards under the provisions of section 55, clause 1, of Act No. XV of 1883. But the sole question we have to deal with now is, whether the conduct of petitioners amounted to a public nuisance as defined in section 268 of the Indian Penal Code. I entirely concur with my learned brother in holding that it did not. The conviction and sentence must therefore be set aside.

1899

QUEEN-
EMPRESS
v.
NANNI.

APPELLATE CRIMINAL.

1899

November 14.

Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS v. KHEM.*

Act No. XLV of 1860 (Indian Penal Code) section 193 Criminal Procedure Code, section 164—Statement made in the course of a "Judicial proceeding"—Statement made before a Magistrate under section 164.

Held, that where a witness had made one statement on oath or solemn affirmation before a third class Magistrate under section 164 of the Code of Criminal Procedure, and again another and totally inconsistent statement at the trial of the case before a Magistrate of the first class he might properly

*Criminal Appeal No. 348 of 1898.

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QUEEN-
EMPRESS
v.
KHEM

be convicted under the second—if not under the first—paragraph of section 193 of the Indian Penal Code. *Queen-Empress v. Bharna* (1) considered and distinguished

This was an appeal by the Local Government from the acquittal of one Khem by the Sessions Judge of Farrukhabad on a charge under section 193 of the Indian Penal Code. The facts were briefly, that Khem had been put before a Magistrate of the third class as a witness in a case of theft and had made a statement before the Magistrate under section 164 of the Code of Criminal Procedure on solemn affirmation. Subsequently Khem, as a witness before the first class Magistrate who tried the case, made a diametrically opposite statement, also on solemn affirmation. Khem was tried on a charge framed in the alternative in respect of these two statements, and was convicted under section 193 of the Code of Criminal Procedure by a Magistrate of the first class. Khem appealed to the Court of Session, and that Court acquitted him on the ground that the statement made by Khem under section 164 of the Code of Criminal Procedure before the third class Magistrate was not made in the course of a judicial proceeding, and with reference to the case of *Queen-Empress v. Bharna* (1). From this acquittal an appeal was preferred by the Local Government.

The Government Advocate (for whom Mr. W. K. Porter), for the Crown.

KNOX and AIKMAN, JJ.—In this case, as in the cases which have preceded, the accused had been convicted on an alternative charge of giving false evidence in that he made two contradictory statements. The first statement was made before a Magistrate of the third class while a police investigation in a case of theft was pending. The second was made before a Magistrate of the first class who tried the case. Khem in his defence stated that the statement which he had made in the Court of the Magistrate who tried the theft case was a true statement, and that the statement which he had made to the effect that three other persons had been present at the theft, namely, the statement which he made before the Magistrate of the third class, was made through fear and at the instigation of the police. The learned Sessions

(1) (1886) I. L. R., 11 Bom., 702.

Judge on Khem's appeal considered himself bound to follow the ruling *Queen-Empress v. Bharna* (1) and to hold that a statement taken down in the course of a police investigation by a third class Magistrate is not evidence in a stage of a judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code. Even if this were a right view of the law, the false statement made under such circumstances would fall within the second paragraph of section 193 of the Indian Penal Code. Moreover, the ruling which the learned Sessions Judge has followed is not one which applies to the present case. The statement with which the Bombay Court was dealing was a statement taken by a third class Magistrate in an investigation into a charge of murder, and it was on the ground that such Magistrate had not authority to carry on the preliminary inquiry in the case that the statement so recorded was held not to be evidence in a stage of judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code. If the view of the Bombay Court taken in that case is a correct view, it does not apply to the case before us, in which the Magistrate who recorded the statement under section 164 of the Code of Criminal Procedure had himself authority, inasmuch as the case was one of theft only, to complete the trial. We have examined the statements made by Khem on the 18th and 23rd of January. They are statements so contradictory that we cannot see any way of reconciling them, and one or the other of them must have been false to the knowledge of the accused. We accordingly allow the appeal, and setting aside the appellate judgment of acquittal, restore the conviction of the Magistrate. We think, however, that it will be sufficient to direct that the accused suffer rigorous imprisonment for the space of three months with effect from to-day's date. Any portion of the imprisonment or detention since this appeal was filed that the accused has undergone on this charge will be deemed to be part of the substantive sentence.

[See also in this connection *Queen-Empress v. Alagu Kone* (2) and *Queen-Empress v. "Puran"* (3)—ED.]

(1) (1886) I. L. R., 11 Bom., 702.

(2) (1892) I. L. R., 16 Mad., 421.

(3) Weekly Notes, 1899, p. 39.

1899

QUEEN-
EMPRESS
v.
KHEM.

1899
November 15.

Before Mr. Justice Knox and Mr. Justice Atkinson.

QUEEN-EMPRESS v. GANGA DIN.*

Act No. XI of 1878 (Arms Act), sections 13, 21—Exemptions from provisions of Arms Act—Government Notification No. 518 of the 6th March 1879—Government Notification No. 453 of the 1st March, 1898—"Personal use" of Arms—Arms carried and used by servant of exempted person.

By a notification under section 27 of the Arms Act (Act No. XI of 1878) issued by the Government of India, certain persons, amongst them Rajas and Members of the Legislative Council of the Lieutenant-Governor of the N.-W. P., were exempted from the operation of sections 13 and 15 of the said Act; but with this proviso, that, "except where otherwise expressly stated, the arms or ammunition carried or possessed by such persons shall be for their own personal use, &c., &c." Held that the terms of this proviso would allow of a person exempted under the notification above alluded to sending a servant armed with a gun into a neighbouring district to shoot birds for him, and that a gun so carried and used by the servant of the exempted person was in the "personal use" of the exempted person within the meaning of the notification.

THE facts of this case were as follows:—

One Ganga Din, Pasi, a servant of Raja Rampal Singh, a Member of the Local Legislative Council, was found within the district of Allahabad carrying a gun and ammunition and using the gun for the purpose of shooting game. On being asked by the Police for his license he replied that he had none, but that he was a servant of Raja Rampal Singh, to whom the gun and ammunition belonged, and was out shooting under his master's orders and for his master's benefit. Ganga Din was put upon his trial before a Magistrate of the first class for an offence under section 19 of the Arms Act, 1878, but was acquitted with reference to the ruling of the High Court in *In re Hurley* (1). Against this order of acquittal an appeal was filed by the Local Government.

Prior to the year 1898, a notification of the Government of India, (No. 518 of the 6th March 1879) was in force, which, so far as the question raised by the present case is concerned, ran as follows:—"The Governor-General in Council is pleased, under section 27, to exempt from the operation of all prohibitions and direction contained in sections 13, 14, 15 and 16 of

* Criminal Appeal No. 569 of 1899.

(1) Weekly Notes, 1881, p. 7.

the Indian Arms Act, 1878
mentioned persons, namely :—

(1) All Maharajas, Rajas, &c. &c.

(2) All Members * of the Council of the
Lieutenant-Governor of the North-Western Pro-
vinces and Oudh.

(3) All Military and Naval officers, *
subject to the proviso that the arms and ammuni-
tion carried or possessed by such persons shall be
for their own personal use, & . &c.”

1899

QUEEN
EMPERESS

GANGA DIN

By a notification of the Government of India of the year 1898
(No. 458 of the 18th March 1898) the proviso to clause (3) above
quoted was removed from its situation at the end of clause (3) and
appended to the first paragraph of section I of the Notification
preceding clauses (1), (2), (3) &c.

The ground of appeal in the present case was that by reason
of the new Notification the proviso above-mentioned applied
not only to Military and Naval officers and others mentioned in
clause (3), but to the persons designated in clauses (1) and (2) and
that it could not be said that a gun in the possession of a servant
in another district from that in which the master ordinarily
resided was in the personal use of the master within the meaning
and intention of Government Notification

The Government Advocate, (for whom Mr. W. K. Porter)
for the appellant.

Pandit Madan Mohan Malaviya (for whom Pandit Tej
Bahadur Saprna) for the respondent.

KNOX and AIKMAN, JJ.—This is an appeal preferred by
Government from an original order of acquittal passed by a
Magistrate of the first class, Allahabad. One Ganga Din, servant
of Raja Rampal Singh, a Member of the Legislative Council,
N.-W. P. and Oudh, was found within the district of Allahabad
carrying a gun and ammunition, and using the gun for the purpose
of shooting game. Upon being asked by the Police to show his
license he replied that he had no license, but that he was a servant
of Raja Rampal Singh, who had ordered him to shoot game for
him (the Raja), and that the gun and ammunition belonged to the
aforesaid Raja. The Magistrate, we must take it, has found that

1899

GREEN-
EMPTISS"
GANGA DIN.

the pleas raised by Ganga Din are all true, that he is the servant of a master exempted from the operations of sections 13 and 16 of Act No. XI of 1878. Following a precedent of this Court, *In re Hurley*, decided on the 12th January, 1880, and to be found at page 7 of the Weekly Notes for 1881, the Magistrate found the accused not guilty of any offence under section 19 of the Arms Act, and acquitted him. It was contended by the Government in this appeal that the accused is guilty, and that the Magistrate has overlooked the fact that the rules in force, when the ruling cited by him was pronounced, have been amended by the Government Notification No. 458 of the 18th March, 1898. The last named notification is a notification amending a prior notification No. 518 of the 6th March, 1879. So far as this case is concerned, the amendment is one which purports to impose a limit or qualification upon the general exemption which under the notification of 1879 was conferred upon all Rajas. The general exemption thus conferred is now controlled by the proviso that the arms or ammunition carried or possessed by such Rajas shall be, except when otherwise expressly stated, for their own personal use. The learned counsel for the Crown contends that the use by Ganga Din, under the circumstances we have set out above, cannot be deemed the personal use of the Raja. We have considered his argument very carefully in view of the serious results which will follow from so literal an interpretation of these words. We are unable to construe, and have been shown no authority for construing, these words in the strict sense contended for. We are unable to hold, as the learned counsel desires us to, that the meaning is that only the Raja who may be exempted under the above notification, can carry on his own person the arms which he may happen to possess. It was allowed in the argument that personal use might extend to a case where the Raja might be intending to use the arms personally, and such arms were in the meantime being carried for the Raja by some servant or retainer. We cannot believe that the intention of the Government, when they granted the exemption, was that the privilege of the exemption should only extend to personal use by the Raja in the narrow sense contended for. Take, for instance, the case of the Raja's residence being attacked by dacoits; it surely never could be contended

that personal use extended only to the use of arms repelling the attack by the Raja, and that the use by any of the Raja's retainers for such purpose was not equally within the intention and scope of the exemption. If the Government did intend to limit the exemption to the extent now contended for, we should expect words of a far more stringent and limiting nature. In the present case we hold that Ganga Din has established to the satisfaction of the Court that he was using the arms he carried for what may fairly be termed the "personal use" of the Raja. We accordingly dismiss the appeal. Let the record be returned.

Appeal dismissed.

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QUEEN-
EMPERESS
v.
GANGA DIN.

APPELLATE CIVIL.

1890
November 21.

Before Mr. Justice Blair and Mr. Justice Burkitt.

MUHAMMAD LAL AND ANOTHER (PLAINTIFFS) v. KEWAL RAM
(DEFENDANT).*

Execution of decree—Civil Procedure Code, section 244—Suit brought under circumstances where the proper remedy was by application under section 241—Discretion of Court to treat the plaint as an application under section 241.

Where certain judgment-debtors, whose property had been sold in execution of a decree, brought a suit to have the sale in execution set aside under circumstances in which their proper remedy in law, if any, was by means of an application under section 244 of the Code of Civil Procedure, it was held that it was not an improper exercise of the discretion of the Court in which such suit was brought to treat the plaint as an application under section 241 of the Code. *Bire Mahata v. Shyams Churn Khawar* (1) followed. *Mogun Pathani v. Pokaran* (2) referred to.

The facts of this case, as stated in the judgment of the lower appellate Court, were as follows:—

"Khushwakt Rai, the father of the plaintiffs, owed a debt to Data Ram and others under a hypothecation bond dated the 11th August, 1875. Data Ram and others brought a suit for the debt, and on the 25th August, 1887, obtained a decree against the plaintiffs and Chunni Ram, their nephew (brother's son). In execution of this decree the hypothecated and unhypothecated

* Second Appeal No. 119 of 1897 from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 8th April 1897, reversing the decree of Maulvi Muhammad Azam-ad-din, Munsif of Aligarh, dated the 1st June 1896.

(1) (1895) I. L. R., 22 Cal., 183. (2) (1898) I. L. R., 22 Mad., 347.

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JHAMMAN
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v.
KEWAL
RAM.

property of the judgment-debtors was sold at auction on the 26th April 1893, and the 20th February 1894, and the said auction sales were confirmed, and mutation of names was effected in favour of the auction-purchasers. The plaintiffs now contend that as they were employed in another district they could not present themselves in Court at the time when the decree was passed in that case, nor could they obtain a knowledge of the execution proceedings; that the decree is in a great measure contrary to the judgment and is absurd; that the amount of the decree, in satisfaction of which the auction sales took place, has been overstated and is wrong; that the invalid and fraudulent proceedings taken by the defendant have caused great loss to the plaintiffs. Hence the plaintiffs pray that the decree passed on the 25th August, 1887, so far as the defendant has fraudulently caused it to be prepared contrary to the judgment and prejudicial to the rights of the plaintiffs, may be set aside, and that the auction sale of the plaintiffs' purchased property detailed at the foot of the plaint, which, according to law, could not be sold in execution of the said decree, may be set aside, together with all the other fraudulent application proceedings. The Munsif, considering the suit to be an application under section 244, has set aside the sale of the zamindari share in claim. The substance of the grounds of appeal, as stated by the pleader for the appellant, is as follows:— (1) that the Munsif had no jurisdiction to set aside the auction sale, treating the regular suit as an application under section 244. The finding of the lower Court is *ultra vires*."

On this first plea of the defendant-appellant the lower appellate Court set aside the decree of the Munsif, who had set aside the sale of the 20th February, 1894, and dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court, their first plea being that "there is nothing in law to prevent the appellants' plaint being treated as an application under section 244 of the Code of Civil Procedure when it fulfils the other requirements of that section."

Babu Durga Charan Banerji, for the appellants.

Babu Jogindro Nath Chaudhri (for whom Harendra Krishna Mukerji, for the respondent.

BLAIR and BURKITT, JJ.—We thoroughly concur in the reasoning which has induced the Calcutta High Court in *Biru Mahata v. Shyama Churn Khurvas* (1), and the Madras High Court in *Mayan Pathuli v. Pakuran* (2), to pass by the formal defect in bringing a suit instead of making an application under section 244 of the Code of Civil Procedure. It seems to us a reasonable exercise of discretion and one which could do no injury to the parties. The appeal is decreed. The decree of the lower appellate Court is set aside, and that of the first Court is restored with costs in all Courts.

1899

JHAMMAN

LAL

" KEWAL
RAM.*Appeal decreed.*

FULL BENCH.

1899

December 15.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

M. J. POWELL (APPLICANT) *v.* THE MUNICIPAL BOARD OF
MUSSOORIE (OPPOSITE PARTY).*

*Act No. XV of 1883 (N.-W. P. and Oudh Municipalities Act), section 69—
Complaint of offence against Municipal bye-law—Power of Municipal
Board to give a general authority to institute complaints on its behalf.*

Held that section 69 of the N.-W. P. and Oudh Municipalities Act, 1883, confers upon Municipal Boards in the North-Western Provinces and Oudh the power to delegate generally their authority to make complaints in respect of municipal offences; and this general delegation includes not merely the giving of authority to do the formal act of presenting a complaint to a Court, but the exercise of discretion as to whether in any given case a complaint shall or shall not be made.

THIS was a reference to a Full Bench of a question arising out of an application for revision of an order convicting the petitioner of an offence against the bye-laws of the Municipal Board of Mussoorie, namely, to what extent a Municipal Board is competent, under section 69 of Act No. XV of 1883, to delegate its powers as to making complaints in respect of municipal offences. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Chief Justice.

*Criminal Revision No. 442 of 1899.

(1) (1895) I. L. R., 22 Cal., 483. (2) (1898) I. L. R., 22 Mad., 347.

1899
M J
POWER
P.
THE
MUNICIPAL
BOARD OF
MISSOURI

Mr. *W. Wallach*, for the applicant.

The Municipalities Act enables municipal boards to frame rules and bye-laws encroaching on ordinary rights of the public and constituting offences of acts which according to the ordinary law of the land are not offences. Section 69 has been passed as a safeguard for the protection of the public and ought as such to be strictly construed. Its object is to prevent people who are innocent or may have been guilty of purely technical offences against municipal rules or bye-laws from being needlessly harassed by prohibiting a Court from taking cognizance of offences punishable under the Act or rules made under the Act, except on complaint of the Municipal Board or "some one authorized by the Board in this behalf," *i.e.* in behalf of each particular complaint. The Board has a duty imposed upon it, of which it cannot divest itself. The whole object of the section fails if the Board be allowed to delegate its authority to a person to generally institute prosecutions on behalf of the Board. If that construction were adopted the Board could vest a chaukidar or police constable with power to institute prosecutions under the Act whenever he thought fit; and the authority thus granted under section 69 would very likely be frequently used as a means of oppression and annoyance. The same might be said in the case of small municipalities, where the authority in question would most likely be vested in a poorly paid secretary.

Counsel referred to kindred English Acts and pointed out that although local governments are of very long standing in England, no English Statute seems to go so far as to enable local bodies to generally vest the power to institute prosecutions in any one. Powers of delegation in English Acts are not granted in a vaguely worded section, but whenever they occur they are strictly specified and limited.

Counsel also referred to the explanations added to the corresponding sections in the recent Punjab Municipalities Act (Act XX of 1891, section 186) and Burma Municipalities Act (Burma Act III of 1898, section 195), to show that in those Acts an explanation was deemed requisite to invest the Board with the power of general delegation.

Mr. *E. Chamier*, for the Municipal Board.

The words "authorized by the Board in this behalf" in section 69 of Act No. XV of 1883 are wide enough to include a general authority; the construction contended for by the applicant is unnatural and would in the case of any large Municipality bring about a dead-lock, as the Board could not itself deal with every breach of the bye-laws and decide whether a prosecution should be instituted. The words "authorized in this behalf" are used in other Acts to denote a general as well as a special authority. See section 59 of Act No. XII of 1881; section 51 of Act No. XIV of 1882; section 19, explanation 2, of Act No. XV of 1877.

No argument can be founded on the desirability or otherwise of allowing the delegation of the power to institute prosecutions. The Act contemplates the delegation by the Board of important functions: see sections 26, 34(c), 58, &c.

Unless compelled to do otherwise the Court should place such construction upon section 69 as will effectuate the obvious intention of the Legislature and not produce serious inconvenience. See *Maxwell on Statutes*, pp. 319 and 423, *Hardeastle on the interpretation of Statutes*, pp. 99–102. *Queen-Empress v. Hori* (1).

Section 69 of Act No. XV of 1883 now in question is a reproduction of section 46 of Act No. XV of 1873 and earlier enactment. The words "authorized in this behalf" have for a great many years been understood as including a general authority. In re-enacting this provision the Legislature must have been aware of the construction which had been placed upon it, and must have intended that the words should be understood in their received meaning. See *Commissioners for Income Tax v. Pemsel* (2).

STRACHEY, C. J.—The petitioner in this case has been convicted and sentenced by a Magistrate of the Dehra Dun district for a breach of rule 19, part 2 of the bye-laws made by the Municipal Board of Mussoorie under the North-Western Provinces and Oudh Municipalities Act (No. XV of 1883). The first ground stated in the petition is as follows:—"Because the Magistrate could not legally take cognizance of the offence (1) (1899) I. L. R., 21 All., 391. (2) L. R., 1891, A. C., 531: at pp. 590–91.

1899

M. J.
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complained of, as no complaint was made either by the Municipal Board or by any person authorized by the Board on that behalf." That is the only point which the Division Bench dealing with this case has referred to the Full Bench. It relates to section 69 of Act No. XV of 1883, which provides that "a Court shall not take cognizance of an offence punishable under this Act, or the rules made under this Act, except on the complaint of the Municipal Board, or of some person authorized by the Board in this behalf. Now on the 27th April 1897, as appears from a copy of the minutes of the Board, the following resolution was passed under the head of "Appointment of Public Prosecutors." "Resolved that the Chairman, Vice-Chairman, Health Officer and Secretary be vested with authority under section 69, Act XV of 1883, to institute prosecutions on behalf of the Board." In the present case a complaint against the petitioner of a breach of the bye-law in question was made to the Magistrate by the Secretary of the Board. There can be no doubt that the authority under which he professed to make the complaint was the resolution which I have just quoted. It is not shown or suggested that, apart from that resolution, the Board gave any authority for the prosecution. The question is whether, by reason of the resolution, the Secretary was a person authorized by the Board in this behalf within the meaning of the section so as to entitle the Court to take cognizance of the offence on his complaint. On behalf of the petitioner it has been contended that the words "authorized by the Board in this behalf" do not include a general authority to prosecute in regard to offences under the Act or rules generally, such as that given by the resolution, but are confined to a specific authority to be given by the Municipal Board in relation to the specific offence for which the accused is to be prosecuted. In other words, that the case contemplated by the closing words of the section is one in which the determination to prosecute for the offence is the determination of the Municipal Board alone, and in which the Municipal Board having decided that there shall be a complaint, merely authorizes some person to lay that complaint before the proper Court. There is no authority to be found upon this point. It is clear that the section was enacted with a two-fold purpose. The object was, in the first place, to exclude

prosecutions for what may be called municipal offences from the interference of irresponsible persons, and to secure that such prosecutions should have the guarantee of the responsibility of the Municipal Board. A further object, in my opinion, was to relieve the Municipal Board of the necessity of itself dealing with each individual case of prosecution for a municipal offence, and to enable it to assign that particular function to some other person or persons. Now the first complaint spoken of in the section is the complaint of the Municipal Board. It is clear that the Municipal Board can make a complaint. But, as it is a corporate body, the only way in which it can make a complaint is to authorize some person to make one on its behalf, just as it can only do any other act through the instrumentality of some agent. So that, if the section stopped there, such cases could only be prosecuted by the Municipal Board considering the individual case and the propriety of the prosecution, passing a resolution that the prosecution should be instituted, and directing its officer to take the necessary proceedings. That is how the matter would stand if the section ended with the words "Municipal Board." It is clear that the remaining words of the section were intended to provide for another sort of case. If the argument for the petitioner is sound, in a case where a Municipal Board desired not itself to make a complaint, but to authorize some other person to make one, it would have to adopt exactly the same procedure as I have just pointed out, it would have to adopt if making the complaint itself. The argument is that the authority there spoken of only means an authority to file the particular complaint, that authority being conferred after the Board had, as in the other case, itself determined on a prosecution by resolution passed at one of its meetings. It appears to me that such a construction involves two consequences, each of which is sufficient to condemn it. The first is that it renders the concluding words of the section absolutely superfluous. The second is that it entirely defeats what I think was the obvious intention of the Legislature that some relief at all events should be given to the Municipal Board, which has necessarily other and many duties to perform, without forcing on it that detailed and individual examination of every case which is required where the complaint is made by the

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Board itself. Of course the wording of the section is not quite as exact as might be wished, because to some extent, and taken literally, the two parts of it overlap each other. A "complaint of the Municipal Board" in itself implies the Board authorizing some body to make the complaint, because, as I have said, the Board being a corporate body cannot make a complaint at all without authorizing some one to make it. Again, if the Board does authorize some person in the words of the second part to make a complaint, that complaint is, strictly speaking, the complaint of the Board itself. But when you look at the section with an eye to the object which the Legislature had in view, I think the meaning is pretty clear. "Complaint of the Municipal Board" I think refers to a case where the Board is the real author of the complaint, in the sense that the complaint is the result of the determination of the Board itself. The complaint spoken of in the last words of the section similarly means, in my opinion, a complaint which is the result of a determination, not by the Board itself but by some person authorized by the Board in that behalf. That appears to me to be the only way in which you can give effect to the distinction which the Legislature evidently had in view, and to all the words of the section which the Legislature has enacted. If this view is correct, it follows that the Legislature meant by the concluding part of the section to empower a Municipal Board to give authority to some other person, not merely to do the formal or mechanical act of putting a complaint before the Magistrate, which it would have to do if it desired to make the complaint itself under the first part of the section, but to determine whether there should be a complaint at all. Is there anything in any word of this section which is inconsistent with this view? The words used are as general as possible:—"Authorized by the Board in this behalf." A general authority, that is an authority to act in all cases or in a class of cases, is a familiar form of authority to an agent or an officer. The word "authorized" would include it just as much as the narrower kind of authority, which consists in authorizing an agent merely to take specific action in a particular case. That the wider meaning is not an exceptional or anomalous one is further shown by the instances cited by Mr. *Chamier* of

other enactments, such as section 59 of the N.-W. P. Rent Act, 1881, section 51 of the Code of Civil Procedure, and section 19, explanation 2, of the Limitation Act, 1877, in which the same words "authorized in this behalf" are clearly used in the sense of a general authority. Then if the language used is wide enough, why should we go out of our way to place restrictions on it? The Government Advocate has pointed out what would be the result of restricting it in the manner suggested. In some of the larger Municipalities constituted under this Act he said—and I think with truth—that the section would be utterly unworkable if so restricted. In a large community with a multiplicity of local business, and where offences against bye-laws of greater or less importance are of constant occurrence, it is impossible that the Municipal Board should meet and deliberate and pass resolutions in every case before any complaint could be instituted. The meetings of the Board are subject to regulations as regards convening, notices to be sent to the members, and as to quorum, and so pre-suppose a machinery which often means considerable delay, and which could not possibly be applied as a preliminary to each and every prosecution for a municipal offence. That is precisely the consideration which induced the Legislature to enact the concluding words of section 69. I can see no *a priori* improbability, no considerations of public policy which would make it unlikely that the Legislature should entrust to a Municipal Board power to confer on other persons not only a specific authority to file a particular complaint, but a general authority to prosecute for municipal offences, including authority to determine whether a prosecution is desirable. Such a power might, it is said, be abused. If it were abused, a remedy might be found in Chapter V of the Act. That the Legislature itself regards such a power as one which may properly be given to a Municipal Board may be inferred from section 186 of the Punjab Municipal Act, 1891, which is in terms practically identical with section 69 of Act XV of 1883, but to which an "Explanation" is appended providing that "the committee may authorize persons to prosecute either generally in regard to all offences under this Act and the rules thereunder, or particularly in regard only to specified offences or offences of

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a specified class." The Burma Municipal Act, 1898, section 195, contains a similar explanation. These provisions cannot, of course, be used for the purpose of construing Act XV of 1883, but they appear to me to support the view that there is no reason of public policy or convenience why a general authority should not have been included within the words which section 69 uses. For these reasons I have come to the conclusion that the complaint in the present case was made by a person authorized by the Board within the meaning of section 69, and that the first ground for the present petition therefore fails. This is my answer to the reference.

KNOX, J.—I concur in the answer given and in the reasons therefor.

BLAIR, J.—I find myself constrained to give the same answer to the question propounded as has been given by the Chief Justice, and I find myself constrained to that conclusion by the consideration that another construction would impose on Municipal Boards burdens absolutely intolerable. The section appears to me to be unfortunately drawn, and there are points of view from which I should have been inclined to adopt another interpretation, but I cannot believe that the Legislature intended by that section to make Municipal institutions unworkable.

BANERJI, J.—I would make the same answer to the reference as the learned Chief Justice. I find nothing in section 69 of Act No. XV of 1883 to justify the contention that there cannot be a general delegation of authority by a Municipal Board in the matter of initiating and instituting complaints. The language of the section is wide and flexible enough to authorize a general delegation of the Board's discretion, and as the limitation of its provisions for which the petitioner contends will lead to great practical inconvenience, I see no reason for so construing those provisions as to give rise to such inconvenience.

BURKITT, J.—In this matter the argument *ab inconvenienti* is, in my opinion, overwhelmingly strong. It is clear from the arguments which we have heard to-day that unless the construction put on section 69 by the learned Chief Justice be adopted, it will be impossible for any but the smallest Municipalities in these Provinces to cope with the absolutely

necessary work of prosecuting persons who have been guilty of breaches of Municipal bye-laws. For that reason, though I cannot wholly adopt the views of the learned Chief Justice, I am not prepared to record a dissentient judgment.

AIKMAN, J.—I concur in the answer proposed to be given to the reference by the learned Chief Justice and my brother Judges. The language of section 69 of the N.-W. P. and Oudh Municipalities Act, 1883, is, in my opinion, susceptible of the interpretation for which the learned Government Advocate contends. That interpretation is, to my mind, the most natural construction of the section, as it is undoubtedly the most convenient, and it is the construction which has all along been placed on the section by the Boards which have had occasion to act under it.

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Before Mr. Justice Knox, Mr. Justice Banerji, and Mr. Justice Aikman.

IN THE MATTER OF THE NEW EGERTON WOOLLEN MILLS.*

Stamp—Articles of association—Special resolution—Resolution superseding articles of association—Act No. VI of 1882 (Indian Companies Act), sections 76, 79—Act No. I of 1879 (Indian Stamp Act), sch. i., art. 8.

A company limited by shares and already possessing articles of association proceeded to pass a special resolution, in virtue of which a document was drawn up entitled "articles of association" in supersession of the articles theretofore in force. The record of this special resolution was, under the provisions of section 79 of the Indian Companies Act, 1882, sent to the Registrar of Joint Stock Companies to be recorded by him. The document was impounded by the Registrar on the ground that it required to be stamped as articles of association and was not so stamped. Hereafter a reference was made by the Board of Revenue to the High Court under the provisions of section 46 of the Indian Stamp Act, 1879, as to whether the document in question required to be stamped. *Held* that the Indian Companies Act did not contemplate any such thing as new articles of association, and that the document in question was nothing more than the record of a special resolution, and as such did not require to be stamped.

THIS was a reference made by the Board of Revenue for the North-Western Provinces and Oudh, under section 46 of Act No. 1 of 1879. The circumstances which gave rise to the reference were, briefly, as follows. The new Egerton Woollen Mills, a company limited by shares and already possessing articles of

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association, came to the conclusion that their articles of association stood in need of amendment. They accordingly passed a special resolution very largely altering and amending the articles, and the result of this resolution was embodied in a document headed "articles of association." This document, or a copy of it, was forwarded to the Registrar of Joint Stock Companies under the provisions of section 79 of the Indian Companies Act 1882, to be recorded by him. The Registrar impounded it, being of opinion that, owing to the procedure adopted by the company in entirely recasting their articles of association, the document constituted new articles of association and required a stamp of Rs. 25 under article 8 of the second schedule to the Indian Stamp Act, 1879. At the instance of the Company the Board of Revenue referred to the High Court the question whether the document required to be stamped as articles of association, or whether it was merely the record of a special resolution.

Mr. *W. K. Porter*, for the New Egerton Woollen Mills, contended that the document in question was not articles of association; and did not require to be stamped as such. The Indian Companies Act, 1882, (*vide* sections 37 and 39) contemplated that there should be only one set of articles of association during the existence of a Company. But by section 76 of the Act a Company was empowered to "alter all or any of the regulations of the Company contained in the articles of association" by means of a special resolution, as defined by section 77. This was what had occurred in the present case. The Company had by special resolution altered most of the articles of association, and, instead of publishing what was new in the form of an amendment to the articles of association, had entirely recast the articles. Such procedure was adopted for the sake of convenience, but it was not the making of "new articles of association." In point of law the document in dispute was nothing more nor less than the record of a "special resolution" a copy of which had, by reason of section 79, to be forwarded to the Registrar of Joint Stock Companies for the purpose of being recorded by him; it did not constitute "articles of association" requiring to be registered under section 40.

Mr. *E. Chamber, contra*, argued that articles of association were in *pari materia* with rules which partners might make for themselves for the conduct of the partnership business. As such rules might be changed as often as the partners desired, so might articles of association of a Company. The document in question was on the face of it a complete set of articles of association, and required to be stamped as such. It was not permissible to look outside the document itself to ascertain what it was for the purposes of the stamp law. *Chandrakant Mookerjee v. Kartikcharan Charle* (1) and *Ramen Chetty v. Mahomed Ghouse* (2).

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KNOX, BANERJI and AIKMAN, JJ.—This is a case stated under section 46 of Act No. I of 1879 by the Board of Revenue for decision of the question raised in the statement. The statement commences by asking for a ruling regarding the question of the stamp-duty payable on what are termed the New Articles of Association of the New Egerton Mills Company, Limited. It then sets out that an authenticated copy of these so-called "New Articles of Association" was submitted to the Registrar of Joint Stock Companies for registration, and that he impounded them, as he was of opinion that they required to be stamped. The reasons why the Registrar of Joint Stock Companies considered that the document was liable to stamp-duty are that, in his opinion, the New Egerton Woollen Mills Company, instead of altering its existing regulations or making new regulations to the exclusion of those already existing, as they were entitled to do under section 77 of the Companies Act, had, for the sake of greater convenience and perspicuity, preferred to adopt an entirely new set of articles of association as the regulations of the company, to the exclusion of those before in force, they were therefore the articles of association of the company, and required to be stamped under article 3 (presumably article 8) of schedule I of the Stamp Act, 1879. The Board state that they agree with the view thus stated by the Registrar of Joint Stock Companies. Before proceeding further, we would point out that the word "New" is a word imported by the Registrar of Joint Stock Companies into the case. The document, which was presented to the Registrar of Joint

(1) (1870) 5 B. L. R., 103.

(2) (1889) I. L. R., 16 Calc., 432.

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Stock Companies, and which is before us, is headed "Articles of Association of the New Egerton Woollen Mills Company Limited," and not "New Articles of Association," as set out in the reference. After carefully considering the provisions of the Indian Companies Act, 1882, and hearing all that has been said to us by the learned Government Advocate, we are of opinion that there can be no such document under the Indian Companies Act of 1882 as "New Articles of Association." Articles of association are specially referred to in section 37 and following sections of the Act. The sections provide that a company limited by shares may, when on the eve of incorporation, draw up a memorandum of association, and may link with that document articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient. If they do not add articles of association so executed to their memorandum of association, in that case the regulations contained in the table marked A in Schedule I to the Indian Companies Act, 1882, shall be deemed to be the regulations of the Company in the same manner and to the same extent as if they had been inserted in the articles of association and the articles had been duly registered. We have not been referred to any section throughout the Act which provides for the framing of new articles of association, and it seems to us that such would really be a contradiction in terms. We can understand a body of individuals who are about to incorporate themselves into a company drawing up and executing articles of association which shall govern them when so incorporated, and we can understand a company when incorporated resolving that there shall be new regulations which shall supersede or modify the articles which were drawn up at the time when the association was first determined upon. This is provided for by section 76 of the Indian Companies Act, and provision is made in section 79, whereby any and every resolution to this effect shall be printed and forwarded

states, for registration. The document was not new articles of association, or articles of association at all within the meaning of the Indian Companies Act. It was a copy of the special resolution passed by the company, notifying to the Registrar, and through him to the world concerned, that the regulations of the company, which were covered by the resolution, would be the regulations by which the company would in future be bound. These regulations, even though they were new regulations to the exclusion of all the existing regulations of the company, are, by the second paragraph of section 7C, to be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association. The law does not say that they are to be deemed articles of association, but expressly declares that they are to be deemed regulations of the same validity as if they had been contained in the articles of association. The document which has been forwarded to us is certainly not one which falls within article 8 of Schedule I of the Stamp Act of 1879, and is not liable to stamp-duty as provided by that article. This is our decision. Let the Registrar certify it as our answer to this reference.

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Before Mr Justice Blair and Mr Justice Akman
RAM BHAROSE (DEFENDANT) v. KALLU MAL AND OTHERS
(PLAINTIFFS).*

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Partnership—Arbitration—Authority of one partner to sue on behalf of the firm—Authority of one partner to bind the firm by a submission to arbitration—Act No. I of 1877 (Specific Relief Act), section 21.

Held that one partner, though entitled to bring a suit on behalf of the firm of which he is a member to recover a debt due to the firm, has no power, in the absence of special authority, to bind the firm by a submission to arbitration of the claim so brought. *Stead v. Salt* (1) and *Strangford v. Green* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. W. M. Colvin (for whom *Wallach*), for the appellant.
Pandit *Moti Lal*, for the respondents.

* First Appeal No. 29 of 1899 from an order of Babu Nil Madhab Roy, Small Cause Court Judge, Cawnpore, dated the 27th February 1899

(1) (1825) 3 Bing., 101.

(2) (29 Car. II) 2 Mod., 225

was not raised before it. At all events there is no finding of such implied liability.

The third point which might have been raised before the lower appellate Court was that, although there might have been in fact no authority conferred upon Udai Ram to refer matters in dispute relating to partnership business to arbitration, still such a representation might have been made to the public as to the nature and extent of his power as to estop the plaintiffs from saying that he had not the fullest authority to enforce the demands of the firm by any machinery he might choose. That question does not appear to have been raised or decided. The defendant therefore having it found against him that there was in fact no authority, has also failed to obtain a finding upon the question whether there was an implied authority or estoppel made by representation of the partners. There was therefore no bar to the consideration of the details of the plaintiff's claim.

An order of remand has been made upon the basis that the plaintiffs have been held entitled to sue as the defendant has failed to establish any bar to their suit. The order of remand, therefore in our opinion, was right. The appeal should be dismissed, and the costs of this appeal should be costs in the cause.

ARKMAN, J.—This appeal arises out of a suit brought by Kallu Mal, Gopi Ram and Udai Ram, members of a partnership firm, to recover from the defendant Ram Bharose the price of goods supplied. In answer to the suit Ram Bharose pleaded that the matter in dispute had been, under agreement between him and Udai Ram, the managing member of the firm, referred to arbitration, and that consequently the existence of this agreement barred the plaintiffs' suit. The Court of first instance sustained this plea and dismissed the suit. On appeal the learned Subordinate Judge set aside the decree of the Court of first instance and remanded the case under section 562 of the Code of Civil Procedure for decision upon the merits. It is against this order of remand that the present appeal is brought.

It is contended that the reference to arbitration was a valid reference, which binds the partnership, and consequently the suit is not maintainable. The question whether one partner can, without special authority, bind the firm by submission to

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arbitration, does not appear to have been considered in any Indian case. The English authorities are unanimous in holding that one partner cannot, without special authority, bind his firm by such reference. In case of *Stead v. Salt* (1), a firm consisting of five members, brought a suit against the defendant to recover the price of work, labour and materials. It was pleaded that the subject of the demand, for the enforcement of which the action was brought, was concluded by an award. It appeared, however, that submission to the award was signed by three only out of the five members of the firm, and the Court held that submission by three members would not bind the five. There are other cases to the same effect to which it is not necessary to refer. For the appellant to succeed, it appears to me he must show that the reference to arbitration was either an act necessary for, or such as is usually done in, carrying on the business of the firm in question. He has failed to do so. He attempted to show that the other adult member of the firm had expressly consented to the reference, but the lower appellate Court disbelieved the evidence adduced by the defendant and held that no such consent was proved. It appears from the judgment of the lower appellate Court that no attempt was made to argue that Udai Ram, as managing member of the firm, had any implied authority to refer matters to arbitration. I am of opinion, therefore, that the plea, based upon the provisions of the last paragraph of section 21 of the Specific Relief Act, 1877, fails.

One other contention was urged by the learned counsel on behalf of the appellant, namely, that in any event Udai Ram, who virtually referred the matter to arbitration, was bound by the submission. An old case, *Strangford v. Green* (2), is cited as authority for this contention. It may be that in a suit against Udai Ram personally the defendant may be entitled to some relief; but this will not affect the suit brought by the firm of which Udai Ram is a member. I concur in the order proposed.

By THE COURT.—The order of Court is that the appeal be dismissed. Costs of this appeal will abide the event.

Appeal dismissed.

(1) (1825) 3 Bing, 101.

(2) (29 Car. II) 2 Mod, 223.

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Before Mr. Justice Blair and Mr. Justice Burkill.

BALWANT SINGH (PLAINTIFF) v. THE SECRETARY OF STATE FOR
INDIA IN COUNCIL (DEFENDANT).*

*Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 241(1)—Act
No. VIII of 1873 (Northern India Canal and Drainage Act), section
45—Civil and Revenue Courts—Jurisdiction—Suit to recover alleged
excess payments in respect of irrigation dues.*

Held that no suit would lie in a Civil Court to recover payments alleged
to have been made in respect of irrigation dues in excess of what was properly
leviable on the plaintiff.

THIS was a suit instituted in the Court of the Subordinate
Judge of Agra for the recovery of a certain sum of money alleged
to have been paid under the following circumstances as detailed
in the judgment of the Court of first instance :—

“The plaintiff is the zamindar of two villages, namely Kayatha
and Gangni, pargana Firozabad, zila Agra, and pays the irriga-
tion (called the owner’s) rate for these villages. The owner’s rate
is levied on those lands alone which at the time of the last settle-
ment were *usar*, or *bunjur*, or *khakee*, or *naulor*, and which
are now irrigated through the canal; these have been assessed
with an irrigation fee of those lands which did not use to be
irrigated.

“On account of the village Gangni for the years 1292 to
1296 F. Rs. 833-11-10 were taken in excess of the real dues
from the plaintiff’s ancestor through mistake on account of owner’s
rate, that is, on account of those lands which at the time of the
last settlement used to be irrigated by canal or wells, or any
other means; that in the same way Rs. 3,709-14-3 were taken
in excess of the correct dues for the village Kayatha for the same
period; that the lands for which these fees have been taken are
entered in the jamabandis as being *Nahree* or *Chakee*, but
the owner’s rate was taken with respect to them by mistake.
That the numbers of these plots are given in the exhibits marked
from A to T.

* Second Appeal No. 194 of 1897 from a decree of W. F. Wells, Esq., Dis-
trict Judge of Agra, dated the 21st December 1896, confirming the decree of
Maulvi Syed Muhammad Sirajuddin Ahmad, Subordinate Judge of Agra, dated
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"The ancestor of the plaintiff and the servants of his estate relying upon the jamabandis supplied to the zamindars twice a year paid the said amounts.

"In May, 1891, the karindas of the estate discovered the mistake, and therefore on the 14th of May, 1891, an application was made to the Collector for a refund of the amount, but it was disallowed on the 1st of August, 1891.

"A notice under section 421 of the Civil Procedure Code was served upon the Collector on the 9th of March 1894.

"The cause of action arose on the 13th of May, 1891, when the ancestor of the plaintiff and the servants of the estate discovered the mistake, as well as on the 1st of August, 1891, when the application for a refund of the amount was disallowed.

"Upon these allegations the plaintiff seeks to recover Rs. 4,543 from the defendant.

"The defence is :—

"That the plaint has not been properly signed and verified by the plaintiff.

"That the claim is barred by limitation, and the plaintiff has given a wrong cause of action.

"That the amounts in dispute as stated in the plaint are incorrect and greatly differ from the entries in the jamabandis filed by the plaintiff with the plaint.

"That the defendant before the institution of the present suit asked the plaintiff for an account and a list of fields in dispute in order to decide whether any mistake had really been made, but the plaintiff neither sent the said papers to the defendant nor showed them to his pleader.

"That no excess irrigation dues have been realized from the plaintiff, and the dues referred to in the plaint having been fully examined, have been rightly assessed and recovered.

"That the plaintiff and his ancestor had been always paying the irrigation dues and deriving benefits thereof, and the jama-bandis have been always in their hands; they never raised any objection; that the present plaintiff has no *locus standi*. The allegation that the said dues were paid by mistake and the mistake was discovered on the 13th of May, 1891, is wrong.

"That the plaintiff applied to the Collector of Agra for a refund of the amount but it was rejected on the 1st of August, 1891; that no excess irrigation fee has been recovered from the plaintiff, and if any has been recovered, he is not entitled to its recovery under circular A. D. of July, 1883."

Upon these pleadings the Court of first instance dismissed the suit as barred by limitation.

The plaintiff appealed, and the lower appellate Court (District Judge of Agra) dismissed the appeal, finding the suit barred by limitation under article 14 of the second schedule to the Indian Limitation Act, 1877.

The plaintiff thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *E. Chamier*, for the respondent.

BLAIR and BURKITT, JJ.—In our opinion the suit does not lie by dint of section 241, second paragraph of cl. (i), of the Land Revenue Act, No. XIX of 1873, and section 45 of Act No. VIII of 1873. This question was not raised in the appeal or indeed elsewhere at all. The Court below dismissed the suit by the application of art. 14, sch. II of the Limitation Act. The appeal is therefore dismissed, but under the circumstances, without costs.

Appeal dismissed.

Before Mr Justice Blair and Mr. Justice Burkitt.

KANHIA LAL (PLAINTIFF), v. DEBI DAS AND ANOTHER (DEFENDANTS).*

Hindu law—Joint Hindu family—Suit for partition—Plea by defendants that some of the property in suit was their self-acquired property—Burden of proof

In a suit for partition of property alleged to be the property of a joint Hindu family, of which the plaintiff was a member, the defendants, while admitting that some of the property scheduled in the plaint was joint property pleaded that the bulk of the property in suit, of which they were in possession, was their own self-acquired property. *Held* that the burden of proof was on the defendants to show that such property was their self-acquisition.

* Second Appeal No. 410 of 1897 from a decree of C. Rustomjee, Esquire, District Judge of Moradabad, dated the 24th March 1897, reversing the decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 11th December 1893

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Gajendar Singh v. Sardar Singh (1), *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (2), and *Gobind Chunder Mookerjee v. Doorgapersaud Baboo* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, Babu *Ratan Chand* and *Munshi Gokal Prasad*, for the appellant.

The Hon'ble Mr. *Conlan* and Mr. *D. N. Banerji*, for the respondents.

BURKITT, J. (BLAIR, J., concurring).—This is a second appeal in a partition suit. The reply of the defendants to that suit was that the great bulk of the property sought to be partitioned was their self-acquisition, and that it did not belong to the joint family. It was admitted that some of the property scheduled in the plaint was joint property.

At the hearing in the first Court the Subordinate Judge very properly placed on the defendants the onus of proving that the property claimed by them was their self-acquired property. The defendants refused to accept the ruling of the Court in that matter. They persisted in their contention that the onus lay on the plaintiff, and declined to call any evidence in support of their case. They contented themselves with putting in certain saledeeds and such like documents. As to those papers it is sufficient to refer to the case of *Gajendar Singh v. Sardar Singh* (1). Such documents unsupported by any parol evidence, are insufficient to establish the defendants' case. The first Court gave the plaintiff a decree. On appeal the District Judge has reversed that decision. He held that the onus of proof lay on the plaintiff. In so holding we have no doubt he was entirely wrong, and we say so on the authority of *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (2) and of the High Court of Bengal in the case of *Gobind Chunder Mookerjee* (3), and the cases cited therein. We hold that as the defendants set up their separate acquisition in a suit for the partition of a joint family, which admittedly was possessed as such of some property, the presumption of law was that the whole of the property of each individual belonged to the common stock. The burden of proving separate self-

(1) Weekly Notes, 1896, p. 23.

(2) (1843) 3 Moo. I. A., 229.

(3) (1874) 22 W. R., C. R., 248.

acquisition lay on the person asserting it. In our opinion therefore the decision of the Judge was absolutely wrong. We set aside his decree dismissing the suit.

It was urged for the respondents that we should now remand the record so as to give them an opportunity of putting in their evidence. We refuse to adopt that course. The defendants had ample opportunity to produce their evidence. They absolutely refused to submit to the ruling of the first Court and declined to produce evidence. They have only themselves to thank for the consequences. We refuse to assist them. The suit then was practically undefended and was properly decreed by the Court of first instance in the absence of any evidence for the defence. That was a right decree. We restore it, and (setting aside the decree of the lower appellate Court) we allow this appeal with costs.

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Appeal decreed.

Before Mr. Justice Blair and Mr. Justice Burkitt.

ABDUR RAHIM (PLAINTIFF) v. THE MUNICIPAL BOARD OF KOIL
(DEFENDANT).*

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December 16.

Suit for declaration of right to be entered in list of candidates for appointment as member of a Municipal Board—Jurisdiction—Suit brought against the Municipal Board in its corporate capacity.

Where a plaintiff sued for a declaration of his right to have his name entered in the list of persons entitled to be candidates for election as members of a Municipal Board and brought his suit against the Board in its corporate capacity, it was *held* that such a suit would not lie against the Board, even if, which was not decided, it might lie against the revising authority, by the irregular action of which, it was alleged, the plaintiff's name had been excluded from the list of candidates.

THE facts of this case sufficiently appear from the judgment of the lower appellate Court, which was as follows:—

"The plaintiff appellant asks for a declaratory decree against the Municipal Board of Aligarh (*sic*), to the effect that he is entitled to be entered in the list of candidates for election as a member of the Board, and for damages amounting to Rs. 1,100.

* Second Appeal No. 203 of 1907 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th March 1907, confirming a decree of Babu Bapin Behari Bhargava, Subordinate Judge of Aligarh, dated the 6th December 1905.

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"His allegation is that he was elected as a member in March, 1894, but his election was set aside by the Magistrate's order passed in May 1894.

"After this the Municipal Board appointed Mr. H. J. Smith, K. Muhammad Yusuf, L. Sri Lal and Sheikh Amin-ud-din as a revising authority for correcting the list of voters for 1895.

"Muhammad Nur Khan, his former opponent, raised an objection to entry of name of plaintiff on list of voters, on the ground that he paid a monthly rent of less than Rs. 10. The matter was brought up before the revising authorities on 26th January, 1895, and some irregular and illegal proceedings took place, as detailed in the plaint, in consequence of which the name of plaintiff appellant was struck off list of candidates for membership. It is alleged that the order passed by the revising authority was passed *malâ fide* at the instigation of Muhammad Nur Khan, to whom the members of the revising tribunal were partial (Mr. Smith alone excepted). In consequence of this illegal action of the revising tribunal plaintiff appellant failed to be elected in 1895, and this suit is the result.

"The learned Subordinate Judge fixed several issues and decided as below:—

1. The suit is cognizable by a Civil Court.
2. The order of the revising authorities was not wholly regular and the decision was erroneous.
3. The suit is not barred by section 42, S. R. A.
4. The plaintiff is qualified to be a member.
5. The plaintiff can maintain a suit for damages, but he cannot get any because he has failed to prove malice on part of the revising authorities.

"The plaintiff has appealed against this decision. No objection has been taken under section 561, Civil Procedure Code, by the defendant Municipal Board, but I hold that the defendant can nevertheless contest the findings of the lower Court where they are against them. 'A respondent who fails to file a petition under this section is not bound by the findings arrived at against him by the lower Court'— *Bhagoji v. Bapuji* (1), and may take any objection to the decree of the lower Court which he

might have taken if he had preferred a separate appeal—*Kamat v. Kamat* (1); *In re M. Himmat Bahadur* (2).

“Under these circumstances the Government Pleader on behalf of the Municipal Board urges :—

(1) that the suit is not cognizable by a Civil Court ;

(2) that the plaintiff is not entitled to the declaration asked for as against the defendant Board.

“I am referred to the ruling of the Calcutta High Court in *Sabhapat Singh v. Abdul Gaffur* (3) on behalf of the Board.

“The remarks of Mr. Justice Trevelyan, p. 111 *et seq.*, point to the conclusion that a suit would lie under the circumstances stated by the plaintiff appellant, that is, assuming that the allegation of the plaintiff appellant is correct, that his name was struck off the list of candidates in an irregular way by friends of Muhammad Nur Khan, who were not acting in good faith ; it stands to reason that the relief claimed is one which can be considered by the Civil Court acting under section 42, Specific Relief Act.

“This is clearly the meaning of the ruling of the Calcutta High Court referred to above, and as no ruling can be cited to the contrary, I hold that the learned Subordinate Judge was right in finding that he has jurisdiction to try and decide this suit.

“The next point for decision is more difficult—

Can the plaintiff appellant claim the declaration asked for against the Municipal Board ?

“The plaintiff appellant, who has conducted his own case, admits that his claim is against the corporate body represented by the President, and not against the President or any individual member personally.

“In the Calcutta case above noted it was decided that no action for damages could lie against the Magistrate who set aside the election, as he only acted *bond fide* in pursuance of what he believed to be the duties of his office ; and it was further held that no declaration could be made against him, as the matter was not one in which he really had an interest.

(1) (1884) 1 L. R., 8 Bom., 368 (2) (1866) B. L. R., Sup. Vol., 429
(3) (1896) 1 L. R., 24 Calc., 107

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"It was held, however, that an action did lie against those persons who denied the right of the plaintiff and put in force machinery which excluded his exercise of that right.

"In this case the plaintiff appellant bases his suit on the allegation that certain specified members of the Municipal Board, acting under the instigation of his opponent Muhammad Nur Khan, put certain machinery in motion, which resulted in his name being struck out of the list of candidates for the year 1895, and on this ground he says he is entitled to a declaration and damages as against the Municipal Board in its corporate capacity. In this case, according to the rules laid down for the Aligarh Municipality (G. O. No. 716, dated 9th August, 1884), the result of the proceedings of the revising authority was that their order became final, not being corrected by the Magistrate within one month from the last sitting. In other words, the proceedings of the revising authorities were automatically ratified by the Board under the rules, and the order of the revising authorities became for all practical purposes an order of the whole Board.

'But it is not contended that the members of the Board in their corporate capacity were actuated by any malice.

"The order of the revising authorities became the order of the Board under force of circumstances, and it is obvious that the position of the Municipal Board in its corporate capacity is in this case similar to the position of the Magistrate in the Calcutta case. The following remarks apply in this case, *mutatis mutandis*. 'What he (the Magistrate) did was done, or at any rate purported to be done, in pursuance of authority given to him by law. There is a question whether he had any authority to do what he did * * *; but even if that be so, the Magistrate acted *bona fide* in pursuance of what he believed to be the duties of his office, and therefore he would not be liable to an action in respect of it. He would certainly not be liable to any action for damages, and, as far as a declaration against him is concerned, that is not a matter in which he really had any interest. *** We think it very doubtful whether such a decree could be given, and certainly, as a matter of policy, it would not be right for us to do anything which would compel Magistrates of districts to be

brought in in suits of this kind when the contest is really one between the parties who have opposed one another at an election.'

"In this case, applying the principles laid down above, I hold that the real dispute lies between plaintiff appellant and the friends or partisans of Muhammad Nur Khan, and that the Municipal Board in its corporate capacity cannot be dragged into their quarrels.

"The Municipal Board in its corporate capacity acted *bond fide* in pursuance of rules laid down for its guidance by Government, and is not interested in any way with respect to the title of plaintiff appellant to any particular character or right. In this particular instance the right of plaintiff appellant to be elected a member of the Board is not a matter in which the Board in its corporate capacity is interested in the slightest degree.

"For the above reason, I hold that the plaintiff appellant cannot, under s. 42, Specific Relief Act, claim any declaration or ask for any damages against the Municipal Board in its corporate capacity, and the suit must therefore fail.

"It is unnecessary, under these circumstances, to express any opinion on the facts; but I may say that I agree with the learned Subordinate Judge in his finding on the sixth issue, *viz.*, that the plaintiff appellant is qualified under the rules to be a member of the Municipal Board.

"The learned Subordinate Judge for reasons given by him did not award costs to defendant Municipal Board, but in this appeal I am of opinion that the Board is entitled to its costs.

"The plaintiff appellant should have been content with the finding of the learned Subordinate Judge that the proceedings of the revising authorities were irregular and their decision erroneous.

"It is quite clear that as against the Board in its corporate capacity he has no reasonable ground of complaint.

"Appeal dismissed with costs."

The plaintiff thereupon appealed to the High Court.

Babu *Satya Chandar Mukerji* for the appellant.

Mr. *E. Chamier* for the respondent.

BURKITT, J. (BLAIR, J., concurring).—In this appeal various questions have been argued before us, and amongst others the

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question as to whether any suit having for its object to obtain a declaration that the plaintiff is entitled to have his name entered in the lists of electors or candidates could lie against the Municipal Board. We do not propose to decide any of those questions. We are of opinion that the appeal must fail on the short ground that the suit has been brought against the wrong party. The plaintiff's allegation is that by reason of certain tortious acts committed by the revising authority his name was wrongfully struck off the list of persons qualified to stand as candidates for election to the Municipal Board at the next election. This the plaintiff alleged as done at the instigation of, and with a view to please and show partiality to, a disappointed candidate. It is admitted for the plaintiff that he had a remedy by application to the District Magistrate (who had power to revise and amend the list prepared by the revising authority), but that he did not avail himself of that remedy.

We are clearly of opinion that if the plaintiff had any right of suit, as to which we express no opinion, his suit should have been instituted against the persons of whose alleged wrongful acts and misconduct he complains, namely, the persons who constituted the revising authority, and that the suit, if maintainable at all, would lie against them personally for the individual acts done by them. The revising authority had the duty imposed on it of preparing the lists of voters and candidates, subject to the final orders of the District Magistrate, and if the members of that body are responsible to any Court for wrongful acts done by them in the performance of that duty they are responsible as individuals. The Municipal Board in its corporate capacity is not answerable for the misconduct and wrongful acts of the revising authority in preparing the lists. It has no control over or power of amending those lists. The Magistrate of the District is the only authority by which those lists can be revised or amended.

For the above reasons we are of opinion that this appeal fails. We therefore dismiss it with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
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June 27, 28.
July 4, 5.
November
11.

BALKISHEN DAS AND OTHERS (DEFENDANTS) v. W. F. LEGGIE
(PLAINTIFF).

On Appeal from the High Court for the North-Western Provinces.
Sale of land and agreement for re-purchase—Mortgage by conditional sale—Right to redeem—Intention—Regulations I of 1798 and XVII of 1806—Exclusion of extrinsic evidence to vary written instrument—Act No. I of 1872, (Indian Evidence Act), section 92.

A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits.

The vendor did not exercise his right of repurchase; but after many years, gave notice of his intention to redeem, and brought this suit to enforce his right of redemption upon a mortgage by conditional sale.

Held; (1) that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible, being excluded by the enactment in section 92 of the Indian Evidence Act, 1872.

This case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts.

(2) That there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan.

(3) The equity of redemption was rendered applicable to a mortgage of this class by the effect of the Regulation XVII of 1806. The Transfer of Property Act, 1882, section 58, defines a mortgage of this character, stating the already existing law, and practice regarding it; but owing to its date did not apply in this instance.

(4) Redemption had been rightly decreed in the Courts below.

(5) Whether such a mortgage would be redeemable under the Regulation law independently of intention indicated in the instrument was not a point calling for decision. Indications in this case appearing in the deeds were (a), words in the agreement for repurchase similar to those in Regulation I of 1798, relating to the deposit of mortgage money in the Treasury, giving the like power to deposit; (b), the inclusion in the present security of a sum due on an account, open to be increased, other than the price fixed for the repurchase; and other matters. *Bhagwan Sakai v. Bhagwan Din* (1) distinguished.

Present:—LORDS WATSON, HOBHOUSE, and DAVEY, SIR RICHARD COUCH
and SIR EDWARD FREY.

(1) (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 337.

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APPEAL from a decree (23 April 1897) of the High Court, which affirmed, substantially, a decree (8 February 1895) of the Subordinate Judge of Jaunpur.

The suit was brought by the respondent, William Francis Legge, on the 5th November 1894, for the redemption of an alleged mortgage of the 4th February 1873, on which date he executed to Balkishen Das, the appellant, together with Hari Das, since deceased, a firm of bankers in Benares, a deed of sale to them of his estate, named the Patilah taluk, the price stated being Rs. 1,50,000. The consideration was not paid in cash, but consisted in part of money unpaid upon a previous mortgage to the banking firm effected on the 8th April 1872 by the plaintiff in conjunction with a partner (whom he had since bought out) in carrying on Indigo factories, of which he was the sole owner in February 1873. The rest of the consideration was a balance, retained by the banking firm, of the amount then due on an estimate of expenses for conducting the factories, which they financed for the plaintiff.

A second deed, an ikrarnama, was executed by the banking firm to the plaintiff on the same day, and bore even date with the first deed, the deed of sale. By this ikrarnama the firm agreed that they would sell the taluk back to him if he paid on the 1st March 1876 the sum of Rs. 1,65,000 to them; and it was thereby agreed:—(1) that, if the buyers or their heirs should raise any objection to receiving the money and to relinquishing the property, the seller should be competent to deposit that sum in cash in the Treasury, and thereupon obtain possession;—(2) that if the estimate of the expenditure on the Indigo factories should be varied by consent from year to year, then the seller should be liable to pay along with the sum specified above whatever sum might be found to be due at that time, on the factories account.

On the 6th April 1873 a deed was executed between the parties containing "an estimate of expenditure upon the factories;" and the respondent borrowed money, which was secured to be repaid in December 1873 upon an instrument separately mortgaging the factories; which, after fresh borrowing and another deed of estimate in 1874, were sold on the 25th March 1875,

with some other properties, by the plaintiff to the bankers for Rs. 66,000.

The defence of Balkishen Das and of the sons of Hari Das, as his successors in the firm, was that the transaction of the 4th February 1873 was a sale out-and-out of Patilah, and not a mortgage. They denied that any relation of debtor and creditor was subsisting between the parties, and that any agreement to allow the vendor to repurchase for a specified sum, or any relation of mortgagee and mortgagor, continued after the date fixed for payment of the sum for the repurchase, if it was to take place; that date having been the 1st March 1876.

The question to be decided on this appeal was the main one raised by the issues:—whether the instruments of the 4th February 1873 constituted a mortgage by conditional sale or a sale out-and-out. Oral evidence was admitted on each side at the hearing to explain the intention of the parties to the transaction.

The decision of the Subordinate Judge was in the plaintiff's favour. His judgment was that the deeds on their face constituted a conditional mortgage, and he found that by the ancient custom prevailing, the mortgage by conditional sale was generally effected in that way. He referred to the value of the property, which was in excess of the price stated in the sale deed of 1873, as showing, with clauses in the *ikrarnama* (including those above mentioned), the intention of the parties to mortgage, and not actually to sell. His decree was for redemption, on payment by the plaintiff of the Rs. 1,65,000 stipulated for the repurchase, with Rs. 6,607 for principal and interest due on a sum left unpaid, on the expenditure estimated, after the sale of the factories in 1875.

This decision was maintained on the defendants' appeal by a Division Bench of the High Court (BANERJI and AIKMAN, JJ.). Their judgment is reported at length in *Balkishen Das and others v. W. F. Legge* (1). Upon a consideration of the terms of the *ikrarnama*, the surrounding circumstances and the oral evidence, they came to the conclusion, in concurrence with the Court below, that the contracting parties intended the transaction to be one of mortgage by conditional sale, and not to be an

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absolute sale with merely a right to repurchase on a certain date. They did not regard as a precedent for this case that of *Bhagwan Sahar v. Bhagwan Din* (1), which they distinguished from the present.

Mr. J. D. Mayne and Mr. W. Colvin, for the appellants, argued that the judgments of the Courts below were wrong upon the construction of the deeds of 4th February 1873. The true intent and meaning of those deeds were that they ended the relation of debtor and creditor between the parties, and that the bankers became absolute owners of the taluka, after the 1st March 1876. The buyers were until that date under contract to convey that property back to the plaintiff if he should tender to them on that date Rs. 1,65,000, and should also pay any balance that might then be due under the deed of estimate of expenditure dated the 8th April 1872. Those sums were neither tendered nor paid on that date and therefore the sale was from that date indefeasible. The High Court had erred in holding that there were in the surrounding circumstances reason for their putting a construction upon the deeds of the 4th February 1873 different from that which the words literally bore. Also, in the absence of fraud, and for purposes other than to prove it, the Courts below were wrong in admitting oral evidence. This they had admitted to explain what the parties intended by the deeds that had passed between them, and to vary the meaning of the words used; so that what had been plainly a sale had been construed to have been a mortgage. This was in contravention of sections 92 and 93 of the Indian Evidence Act, 1872, which excluded all evidence taken from outside the written agreement. Beside, the evidence for the plaintiff as to the meaning of the parties, even if admissible, was insufficient to outweigh the express words of the registered document. Again, both the Courts below had relied upon an assumed usage of the people to employ language importing a sale with a view to conveying the effect of a mortgage. This was not borne out by evidence. The appellant had the right to contend that there was upon the true construction of the words used in the deeds, not contradicted by any legal evidence, nor by any evidence rightly understood, a sale for valuable

(1) (1890) E. R., 17 I. A., 98; I. L. R., 12 All., 327.

consideration received by the vendor, coupled with a contract under which he was to be allowed to repurchase the property on a fixed day only. When he had failed to repurchase on that day, the right on his part to obtain possession of the property that had passed from him to the defendants ceased to be exerciseable. From and after the 1st March 1876 the relation of debtor and creditor no longer existed. They were then vendor and purchaser. There was no longer any loan, debt or mortgage after that date, the sale having become absolute.

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The decision of this Committee in *Bhagwan Sahai v. Bhagwan Din* (1) was then referred to—wherein was cited the judgment in *Alderson v. White* (2), to the effect that the rule of law on the subject was the following:—that *prima facie*, an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In *Sital Pershad v. Luchmi Pershad Singh* (3), the plaintiff failed to establish that a sale to him, with a right of repurchase, was in effect a mortgage; but in that case there were special circumstances, not presented in this, it was true. The sale in that case was declared to be an acquittance of the debt and the money for repurchase was only to be received under circumstances personal to the debtor, and not shown. Here, there had been a resort to other modes of securing and of clearing the debt on the factories followed by the sale of them, which in 1875 left a comparatively small balance. The principle that continuing indebtedness was to support the view of continuing mortgage was referred to in *The Manchester, Sheffield and Lincolnshire Railway Company v. The North Central Wagon Company* (4).

Mr. A. Cohen, Q. C., and Mr. L. DeGruyther (Mr. A. J. Ashton with them), for the respondent, contended that the judgments of the Courts below were right as to the effect of the deeds of the 4th February 1873. The terms of those instruments, read together, could not but be construed as supporting

(1) (1890) L. R., 17 I. A., 98; I.
L. R., 12 All., 387.
(2) (1858) 2 DeG. and J. 105.

(3) (1888) L. R., 10 I. A., 130.
(4) (1888) L. R., 13 A. C. 551, 560.

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the view that they were intended to operate as a mortgage, and not as a sale out-and-out. Their form was one much used in the North-Western Provinces and elsewhere to constitute a mortgage by conditional sale, termed in the vernacular bai-bil-wafa. It was said to have been the practice of the Muhammadans to employ this form of mortgage, as it avoided, in their opinion, any infringement of their law against the creditor's taking interest from the debtor. Reference was made to Baillie, Moohummudan Law. Supplement "Of Sale," 782, 809. But sale and a right of purchasing back were commonly resorted to in transactions intended to have the effect of mortgages. In the present instance the intention of the parties to mortgage was shown in several ways by the provisions made in the deeds themselves; and, first by the right secured to the vendor, should he conclude to repurchase and should the vendee refuse to accept his tender of the purchase money, to pay it into the District Treasury. That provision was in the words of a clause in Regulation I of 1798 relating to the mortgage by conditional sale, or bai-bil-wafa; secondly, the requirement that advances made, and to be made, for the working of the factories should be repaid at the same time with the payment of the repurchase money; thirdly, the excess of that money, by Rs. 15,000, over the Rs. 1,50,000, the ostensible sale price mentioned in the deed. Next, reference was made to Regulations I of 1798 and XVII of 1806, and the introduction of the right of redemption into the Indian law of mortgage. A statement of that right was not required to be in the deeds themselves, because it was an incident annexed by law without mention in the written contract. Macpherson on Mortgages, 7th ed., pp. 15, 16; Rashbehary Ghose on Mortgages, Tagore Law Lectures for 1877, pp. 136, 139. In 1865 the law of foreclosure in these mortgages was considered in *Forbes v. Amir-un-nissa Begam* (1), where the effect of a bai-bil-wafa, or mortgage by conditional sale, was dealt with as resulting from deeds of sale and defeasance in no way different from those in the present case. On the other hand, in *Pattabhiramier v. Vencaturao Naicken* (2), which came before this Committee from Madras, to which Presidency the rule of the Bengal Regulations

(1) (1865) 10 Moo., I. A., 346.

(2) (1870) 13 Moo., I. A., 560.

allowing redemption at any time before foreclosure had not been extended, a sale was held to have become absolute after default. That was on the ground that the English law relating to the equity of redemption was no part of the ancient Indian law and usage in these matters.

With reference to what was laid down in *Alderson v. White* (1), as belonging to mortgage, that the relation of debtor and creditor must be intended to continue, it was argued that the state of things as shown to be in contemplation by the ikrar-nama of the 4th February 1873 completely satisfied that requirement. The transaction involved that the security should include the debt upon the factory accounts. The principal English cases bearing upon an actual transaction of mortgage receiving effect, though ostensibly a sale, on the first appearance, upon evidence of the intention of the parties to secure repayment according to contract, instead of selling and buying out-and-out, were collected in *Rochevoucauld v. Boustead* (2). In *Rakken v. Alagappudayu* (3), the intention and agreement were proved by oral evidence and a suit for possession founded on a deed of sale was defeated by proof of a contemporaneous oral agreement for reconveyance on the payment of money borrowed. In that case was cited by the Court *Bakshu Lakshman v. Govinda Kanji* (4), and it was held that, without contravention of sections 92, 93 of the Indian Evidence Act, 1872, if it is apparent that the transaction has been treated as a mortgage by the parties, a mortgage it will be held to constitute. The admission of oral evidence was shown by those cases to turn on the necessity of admitting it to expose fraud involved in the conduct of a pretended buyer knowing himself to be mortgagee.

Also were cited *Bhup Kuar v. Muhammadi Begam* (5); *Ali Ahmad v. Rahmat-ul-lah* (6), where the case of *Bhagwan Suhai v. Bhagwan Din* (7) is observed upon; *Rama Sami Sastrigal v. Sunayappa Nayakan* (8); *Ras Muni Dibia v. Prankishen Das* (9).

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(1) (1858) 2 DeG. and J., 98

(2) (1897) L. R., 1 Ch., 196.

(3) (1892) I. L. R., 16 Mad., 80

(4) (1880) I. L. R., 4 Bom., 405.

(5) (1888) I. L. R., 6 All., 37.

(6) (1892) I. L. R., 14 All., 195.

(7) (1890) L. R., 17 I. A., 96.

I. L. R., 12 All., 387.

(8) (1881) I. L. R., 4 Mad., 179.

(9) (1848) 4 Moo., I. A., 392.

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Mr. J. D. Mayne replied.

Afterwards on the 11th November 1899 their Lordships' judgment was delivered by LORD DAVEY.

In and prior to the year 1872 Hari Das and the appellant Balkishen Das carried on business as bankers at Benares. Hari Das was the managing partner. He died on the 27th April 1889. The present appellants are Balkishen Das and the two sons and heirs of Hari Das. The respondent was at that time the owner of a taluka called Patilah in the district of Jaunpur and was also half-sharer of certain indigo factories known as Basharatpur, and carried on the business there in partnership with one De Momet, his co-sharer. By a deed dated the 8th April 1872 the taluka was mortgaged to Hari Das and Balkishen Das for Rs. 1,25,000 and by another deed of the same date (called a deed of estimate) the factories were also mortgaged to them as security for Rs. 60,000, which sum was to be applied partly in payment of previous debt and partly in providing for the necessities of the indigo business for the current year. At the end of the year 1872 it was found that the business had been carried on at a loss. The debt due to the bankers was Rs. 1,90,000 and further advances were needed for carrying on the business. The respondent in these circumstances bought out his partner De Momet and became sole owner of the factories and solely interested in the business. A fresh bandobast or settlement was thereupon made between him and the bankers and was carried into effect by three deeds, of which two relating to the taluka were dated the 4th February 1873 and the third relating to the factories was dated the 6th April 1873.

The first deed of 4th February 1873 was, on the face of it, an absolute sale by the respondent to the bankers for the price of Rs. 1,50,000, which was expressed to be paid in the following manner, *viz.* the bankers retained out of the Rs. 1,50,000 the sum of Rs. 1,37,333-6-0 principal with interest up to date which had by calculation been found due by the respondent to the bankers under the mortgage deed of the taluka dated 8th April 1872 and retained the balance Rs. 12,666-10-0 in part payment of the amount then due on the deed of estimate of expenses for conducting the factories of the Basharatpur concern.

The other deed of the 4th February 1873 was in the following terms :—

"We, Babus Hari Das and Bulkishen Das, sons of Babu Padam Das, proprietors of the firm of Bibu Madhuban Das and Dwarka Das, caste Gujrati, resident of mohalla Gwaldas, in the city of Benares, do declare as follows :—

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"The vendor, Mr William Francis Legge, having, under the sale-deed dated 11th February 1873, sold absolutely, for Rs. 1,50,000, his zamindari right and property in the entire 16 annas of taluka Patilah, pargana Ungli, in the district of Jaunpur, comprising 25 villages, original and attached, together with all sir, sayer items, high and low lands, water and forest produce, water places and tanks, cultivated, uncultivated, saline, waste and jungle lands; village sites, ponds, kitchi and pakka wells, collection houses, tenants' quarters, bamboo clumps, groves and detached fruit and timber trees of all sorts, and stone and wooden mills, inclusive of all the zamindari rights and interest appertaining to the said taluka, without exclusion of any right or property, to us, the executants, has caused mutation of names to be effected. We, the executants, therefore, of our own free will and accord, covenant and declare that if the said vendor pays on 1st March 1876, the amount of Rs. 1,65,000 in a lump sum, we shall sell to the said vendor the whole of the said ilaka sold, as it exists at present, for the said amount of Rs. 1,65,000, and we shall cause everything connected with mutation of names, &c., to be done, neither we nor our heirs shall have any objection thereto. If we or our heirs raise any objection to receive the money and relinquish the property, the vendor shall be competent to deposit the said amount in cash in the treasury, by virtue of this agreement, and obtain possession over the ilaka, we shall have no sort of objection to it. It has further been stipulated by the executants and the vendor that if the amount of the estimate money of the Bisharatpur concern should keep varying on account of alterations made by consent of us, executants, from year to year, then the vendor shall be liable to pay along with the sum abovementioned, whatever sum may be found to be due at that time by him to us executants. The said vendor shall not be competent to effect a sale until the payment of the estimate money relating to the factories of the Bisharatpur concern. We shall recover from the vendor any amount of arrear that may be due to us by the cultivators by making an assignment thereof in favour of the vendor, and after the expiry of 1st March 1876, the said vendor shall not be competent either to pay the money or to make the purchase and the conditions of this deed of agreement shall be deemed to be null and void."

The question between the parties in this appeal is whether the two deeds together constituted a mortgage of the taluka or an out-and-out sale with a contract of repurchase.

After the execution of these deeds the bankers made further advances to the respondent to a large amount on account of the

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Basharatpur concern. By the third deed dated the 6th of April 1873 the sum of Rs. 44,223-14-3 was found due from the respondent up to date, and he mortgaged the factories for Rs. 75,000, out of which the balance was paid off and money was provided for working the factories during the current year.

On the 3rd of March 1874 another deed of estimate was executed for that year, and finally by a deed dated the 25th March 1875 the respondent sold and conveyed the factories to the bankers for a price which left him a debtor to them in the sum of Rs. 5,953-4-3. There is no deed of defeasance to this deed and it was admittedly an absolute sale.

It should be noticed that on the execution of the deeds of 4th February 1873 the necessary mutation of names was made and the bankers entered into and have ever since been in possession or receipt of the rents and profits of the taluka.

The respondent did not buy back or redeem the property on the 1st of March 1876. But on the 5th of November 1894 he commenced the present action for redemption of the taluka, alleging that the deeds of 4th February 1873 constituted a mortgage by conditional sale with possession thereof. The defendants and present appellants, on the other hand, contended that the transaction was an absolute sale with a contract of resale, and the time having expired and the condition not having been fulfilled the contract had become null and void.

The Subordinate Judge held that the documents in question were deeds of mortgage by conditional sale and that the respondent was entitled to redemption. His judgment was affirmed by the High Court.

Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act 1 of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or

their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisoes. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Muhammadans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale "kutkubala" or "bai-bil-wafa" that the mortgagor should make himself personally liable for the repayment of the loan (*see* Macpherson on Mortgages, 5th edition, p. 11).

By Bengal Regulation I of 1798, intituled "a regulation to prevent fraud and injustice in conditional sales of land under deeds of bai-bil-wafa or other deeds of the same nature," provisions were made for the case of the lender refusing to receive the money on the day named. The borrower was empowered to deposit the amount due on or before the stipulated date in the Dewanny Adawlut of the city or zillah in which the land may be situated. If the lender has obtained possession of the land, the principal sum only need be deposited, leaving the interest to be settled in an adjustment of the lender's receipts and disbursements during the period he has been in possession. By Regulation XVII of 1806 the mortgagor under deeds of this description was empowered to redeem the

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land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive, provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous Regulation.

In the case of *Pattabhiramier v. Vencatarow Naicken* (1) it was decided that according to the ancient law of India a mortgage by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the regulation applies the English doctrine of an equity of redemption as applicable to the class of deeds referred to in it.

Mortgages of this character are thus defined in clause (e) of section 58 of the Transfer of Property Act, 1882: "Where the mortgagor ostensibly sells the "mortgaged property on condition "that on default of payment of the mortgage money on a certain "date the sale shall become absolute, or on condition that on such "payment being made the sale shall become void or on condition "that on such payment being made the buyer shall transfer the "property to the seller, the transaction is called a mortgage by conditional sale." The Transfer of Property Act does not apply to this transaction, but it may be assumed that the framers of it in this section intended to state the existing law and practice of India.

The appellants argue that the language, whether of this Act or of the Regulation, shows that in order to attract their provisions there must be underlying ostensible arrangements for sale a real substantial intention to secure money advanced. They rely on the decision of this Board in the case of *Bhagwan Sahai v. Bhagwan Din and others* (2). Their Lordships decided that case on the language of the deeds then in question, which they evidently considered showed that the transaction was not such a transaction as is described in the Regulation of 1806, and there was therefore no right of redemption

(1) (1870) 13 Moo. I. A., 500.

(2) (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 287.

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after the expiry of the date fixed. The appellants contend that such ought to be the conclusion in the present case, seeing that the parties did stand in relation of lender and borrower prior to 1873, and then expressly altered it into that of buyer and seller. The respondents, on the other hand, contend that a conditional sale becomes subject to an equity of redemption by force of the regulations before mentioned independently of any indications in the document that it is intended to be a mortgage. This is a question on which their Lordships are not called on to express an opinion in this case, for the documents in question contain important indications of the intention of the parties. The second deed or ikrarnama provides that if the bankers object to receive the money and relinquish the property, the vendor may deposit the amount in the treasury "by virtue of this agreement" and obtain possession over the ilaka. This provision at once suggests a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or practice by which such deposit could be made by virtue of the agreement alone without the intervention of the Court in a suit for the purpose, while, on the other hand, the words exactly describe the procedure under the Regulation. Again, the estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the Basharatpur concern as of the stipulated sum of Rs. 1,65,000. The practical effect of this was to consolidate the debt on the factories account with the principal sum mentioned in the deed and to give the bankers a security on the taluka for the debt of the factories. This gives the transaction the character of a mortgage so far as the factory accounts are concerned, and if it is to some extent a mortgage it may well be held to be so entirely. There was also some evidence, though not very precise, that the property in the year 1873 was worth considerably more than Rs. 1,50,000. This was accepted in the Court below, but their Lordships do not place much reliance upon it.

Their Lordships hold that the transaction was intended to be, and was, a mortgage by conditional sale, and they will therefore

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humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants—Messrs *Ranlen, Ford, Ford and Chester.*

Solicitors for the respondents—Messrs. *Young, Jackson, Beard and King.*

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November 20.

CIVIL REFERENCE.

Before Sir Arthur Strachey, Knight Chief Justice and Mr Justice Banerji
CHAND MAL AND OTHERS (APPLICANTS) v. LACHHMI NARAIN
(OPPOSITE PARTY).*

Act No. V of 1881 (Probate and Administration Act), section 3—Probate—Will—Document intended to take effect partly in the life-time of the executant and partly after the executant's death

There is no objection to one part of an instrument operating *in presentia* as a deed and another *in futuro* as a will *Cross v Cross* (1) referred to.

THIS was a reference under sections 17 and 18 of the Ajmere Courts' Regulation (No. 1 of 1877). The facts out of which it arose appear from the order of reference, which was as follows :—

“The plaintiffs in the above case applied, on the 29th March, 1898, to the Commissioner, Ajmere-Merwara as District Judge of Ajmere, under section 56 of the Probate and Administration Act (V of 1881) for the grant of probate of a document purporting to be the will, executed on the 10th April 1887, of Musammat Gulab Kunwar, widow of Seth Sobhagnal of Kuchawan. The said Musammat Gulab Kunwar died on the following day, *viz.*, on the 11th April 1887, at Ajmere, leaving, as is alleged, assets to the value of Rs. 7,200 at Beowar and Pushkar within the Ajmere District.

“After the application for probate was made the defendant Lachhmi Narain, minor son of Seth Har Narain, deceased, of Ajmere, by his guardian his mother Musammat Gopi, lodged a caveat, contending *inter alia* that the will was not genuine, that Musammat Gulab Kunwar had only a life interest in the

* Miscellaneous No. 166 of 1899.

(1) (1846) 8 Q. B., 714; S. C.; 15 L. J., (N. S.) Common Law, 217.

property, which devolved on one Dhanrupmal, cousin of Sobhagmal, the deceased husband of the testatrix Musammat Gulab Kunwar, that the caveator had purchased the property situated at Beowar, and subject to the document of which probate was applied for, at a Court sale in execution of a decree passed against Dhanrupmal the next reversionary heir of Seth Sobhagmal, and lastly, that the document for which probate was asked was not a will, inasmuch as it contained provisions which were to take effect during the life-time of the executrix Musammat Gulab Kunwar.

"The District Court rejected on the 20th May 1898, the application for probate, on the ground that the document was not a will, for the reason given in the caveat.

"An appeal was filed in this Court against the order of the District Judge, and was dismissed by Colonel Yate, Officiating Chief Commissioner, on the same grounds that influenced the Court below, namely, that the document for which the probate was applied did not come within the definition of a will.

"Against the order of this Court, which is dated the 27th of September 1898, the plaintiffs have applied for a reference under section 17 of the Ajmere Courts' Regulation, to their Lordships of the Honourable High Court at Allahabad. The case is accordingly submitted for the High Court's consideration, together with a copy of all the important documents connected with it."

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the applicant

Babu *Jogindro Nath Chaudhri*, for the opposite party.

STRACHEY, C. J. (BANERJI, J., concurring).—Our answer to this reference is that such portions, if any, of the document propounded, as the Court below, after taking evidence, may hold to be a legal declaration of the intentions of Musammat Gulab Kunwar with respect to her property which she desired to be carried into effect after her death, amount, in our opinion, to a will, within the meaning of section 3 of the Probate and Administration Act of 1881, notwithstanding that the same document may contain other provisions which she desired should be carried into effect during her life-time.

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We may refer the Court of the Chief Commissioner to the case of *Doe d. Elizabeth Cross v. Arthur Cross* (1) the effect of which is stated in Jarman on Wills (5th ed., vol. 1, p. 25). It was there held that "there was no objection to one part of an instrument operating *in presenti* as a deed and another *in futuro* as a will."

The costs will be disposed of in accordance with section 20 of the Ajmere Courts' Regulation of 1877. Let the case be returned.

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December 22.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji

RAMPAL SINGH (DEFENDANT) v. MURRAY & Co. (PLAINTIFFS)*
Act No. IX of 1872 (Indian Contract Act, Sections 118, 151, 152—Contract—Bailment—Liability of bailee—Liability of guest at hotel in respect of furniture used by him.

The defendant's wife went to stay at a hotel owned by the plaintiffs. While there she was seized with cholera and died. In consequence of the infectious nature of the disease, the plaintiffs were obliged to destroy the furniture which was in the rooms of the defendant's wife, and used by her during her illness. The plaintiffs subsequently sued to recover the value of such furniture from the defendant. *Held* that in the absence of evidence to show that the deceased had not taken as much care of the furniture as a person of ordinary prudence would, under similar circumstances, take of his own goods, the defendant was not liable, having regard to sections 121 and 152 of the Indian Contract Act, 1872. *Shields v. Wilkinson*, (2) referred to.

THE facts of the case sufficiently appear from the order of the Chief Justice.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellant.

The respondents were not represented.

STRACHEY, C. J.—This is a reference to the Court by the Local Government under Rule 17 of the Kumaun Rules, 1894, made under section 6 of the Scheduled Districts Act, 1874. The suit out of which it arises was brought in the Court of the Assistant Commissioner of Naini Tal by the proprietors of the Grand Hotel, Naini Tal, against Raja Rampal Singh. The plaintiffs claimed by their plaint to recover Rs. 580 as due by the defendant

* Miscellaneous No. 246 of 1899.

(1) (1846) 5 Q. B. 714; 5 C. 15 L. J., (2) (1887) 1 L. R., 9 All. 398.
(N. S.) Common Law, 217.

for board and lodging, and incidental expenses incurred during his and the late Rani's residence at the Grand Hotel, Naini Tal. They filed an account, from which it appeared that they claimed Rs. 164 for board and lodging and the balance of Rs. 416 as incidental expenses for the value of certain hotel furniture. The defendant in his written statement admitted liability for the Rs. 164, but denied liability for the balance. From the written statement and from the issues framed by the Assistant Commissioner the following facts appear to have been undisputed. The defendant's wife while staying at the plaintiff's hotel was seized with cholera and died, the defendant not being then at Naini Tal. There was no evidence to show how she caught the disease or whether the source of infection was within the hotel or outside it. Three days after her death the furniture of the rooms occupied by her during her illness was destroyed by the plaintiffs in order to prevent the risk of infection to the residents of the hotel. The defendant did not in his written statement deny that the destruction of the furniture was necessary for that purpose. The only grounds upon which he denied liability were that his wife had contracted the disease after her admission to the hotel, that it should be inferred that she contracted it in consequence of "something wrong in the culinary 'process' of the hotel, and that it was not in accordance with the usage of hotels in Naini Tal to claim value for destruction of property necessitated by death from any epidemic originating in the hotel itself." No special contract varying the ordinary relation of inn-keeper and guest in respect of the goods was alleged. The only issue framed by the Assistant Commissioner, which need be referred to, was as follows :—"Is the defendant liable for the value of hotel property destroyed owing to defendant's wife having died of cholera in the hotel ; and if so to what extent?" There was no issue of fact and no evidence was given by either side. The Assistant Commissioner gave judgment upon the pleadings. He decreed the claim on the grounds that the defendant had adduced "no authorities in support of his somewhat extraordinary contention that he is not liable," and that "plaintiffs have probably suffered in pocket as it is from the scare which a death from cholera in their hotel would doubtless cause ; it would be unfair

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in the extreme to settle them with the cost of new furniture."

Against this decision the defendant appealed to the Court of the Deputy Commissioner of Naini Tal. The Deputy Commissioner held that inasmuch as the defendant and his wife knew, when the latter was admitted to the hotel, "that an incident of such illness as cholera is that articles used by the patient must be destroyed," there was an implied contract by the defendant "to make good any damage caused by the illness of his wife." He accordingly dismissed the appeal. A further appeal by the defendant to the Court of the Commissioner of the Kumaon Division was rejected summarily. The Local Government has referred the decree of the Commissioner to this Court for our report and opinion. The question upon which our opinion is asked is "as to the liability or otherwise of the Raja to pay the cost of the articles belonging to the hotel which were destroyed to prevent the danger of infection in consequence of the death of Rani Rampal Singh from cholera."

At the hearing on the reference the learned advocate who appeared for the defendant stated that his client did not contest his liability, should the Court hold that the wife, if she had survived, would herself have been liable to such a claim. The question therefore is whether, in the absence of express agreement, a guest at a hotel is liable to compensate the owner for the loss of hotel furniture used by the guest while suffering from an infectious disease and destroyed by the owner in order to prevent infection, there being no evidence of negligence on the part of the guest either in the contracting of the disease or in the use of the furniture during his continuance, and it being admitted that the destruction of the furniture was necessary. There appears to be no reported case in point. To decide the question it is necessary first to see what is the true legal relation between the guest and the hotel-keeper in respect of the furniture used by the former. It is clearly the relation of bailor and bailee as defined by section 148 of the Indian Contract Act, IX of 1872. The bailment is one of hire; the guest hires not only the rooms which he occupies, but the furniture which they contain. The nature and extent of his liability are shown by section 152 of the Act

which provides that "the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." And section 151 provides that "in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." So that the question is not responsible for the loss, destruction or deterioration of the furniture hired by him if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own. Ordinary prudence is the test. In the present case the plaintiff's counsel suggested that the defendant's wife did not exercise ordinary prudence in taking care of the furniture, nor is there any evidence that she did not. In the absence of evidence either way, does the burden of proving the exercise of ordinary prudence rest on the hirer, or is it for the owner of the goods to show that ordinary prudence was not exercised? The question of burden of proof in cases of injury to goods delivered under a bailment of hiring was considered by this Court in *Shields v. Holt*, on (1). If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence: otherwise I think that the owner must give some evidence of negligence. Such goods as those in question here, that is, bed-room furniture and articles in the patient's personal use, could not have been used by a person suffering from cholera without being so infected as to require destruction; such damage is a practically irresistible consequence of such use, no matter what degree of prudence is exercised. That being so, it was for the plaintiffs to give some evidence that the defendant's wife did not take as much care of the goods as a person of ordinary prudence would have taken of her own goods under similar circumstances, and no such evidence having been given the defendant is not liable. There is no ground for the Deputy Commissioner's assumption, that because the defendant and his wife may be supposed to have

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(1) (1887) 1 L. R., 9 All., 298.

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known that in the event of infectious disease the articles used by the patient would have to be destroyed, there was an implied contract by them to make good the loss irrespective of any negligence; in other words to insure the owner against such loss. The *prima facie* inference would rather be that in forming with the owner the relation of bailor and bailee, they intended the usual legal consequences to follow, including the ordinary restricted liability of a bailee for hire. If the owner denied any further protection than this, if he wished to throw upon the hirer the entire risk of accidental or irresistible destruction of the goods, he could not do so by the special contract which section 152 allows, but in the absence of any special contract and of any want of ordinary prudence making the hirer responsible, he must be taken to have accepted the risk as an incident of his business. If the goods had remained with him he would have had to bear any loss which ordinary prudence could not have prevented, and his having entrusted them to a hirer, who exercises an equal degree of prudence, is no reason for putting him in a better position, or for exacting from the hirer a greater amount of care than the owner himself would probably have taken.

I think that the Commissioner ought to have allowed the defendant's appeal and dismissed the suit so far as the claim to recover the value of the furniture was concerned. This is our answer to the reference.

BANERJI, J.—I am of the same opinion.

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 January 16.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.
 BANKE LAL AND OTHERS (PLAINTIFFS) v. JAGAT NAKAIN (DEFENDANT).
 BANKE LAL AND OTHERS (PLAINTIFFS) v. DAMODAR DAS AND ANOTHER (DEFENDANTS).*

Execution of decree—Sale in execution—Sale set aside—Second sale in execution of a different decree—First sale subsequently confirmed in suit for that purpose—Title of purchasers at first sale—Civil Procedure Code, sections 311, 312.

Certain immovable property was sold in execution of a decree, but on objections being raised by the judgment-debtors under section 311 of the Code of Civil Procedure the sale was set aside. After the sale had been thus set aside

* First Appeals, Nos. 115 and 116 of 1898, from decrees of Babu Madho Das, Subordinate Judge of Bareilly, dated the 30th March 1898.

the same property was again sold in execution of another decree. Subsequently in a suit brought by the purchasers at the first sale (in which suit the judgment-debtors, who alone were made defendants, confessed judgment) the first sale was confirmed. The purchasers at the first sale then sued the purchasers at the second sale for possession of the property sold. *Held* by STRACHEY, C. J., that the second purchasers having acquired their title at a time when the first sale had been rescinded their title was not affected by the subsequent confirmation of the sale and was good as against the first purchasers. *Held* further by STRACHEY, C. J., and BANERJI, J., on the finding that the decree confirming the first sale had been passed in a suit to which the purchasers at the second sale were no parties, and had, moreover, been obtained by means of collusion between the plaintiffs and the judgment-debtors, that such decree could not defeat the title acquired by the purchasers at the second sale.

Duggin v. Panchanang Gangaram (1), *Kanapa v. Jonardan* (2), *Adhur Chunder Banerjee v. Agbore Bhat Limbo* (3) and *Ram Chunder Sadhu Khan v. Sumir Ghosh* (4) distinguished. *Nasir Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* (5) referred to by STRACHEY, C. J.

THE facts of this case are fully stated in the judgment of the Chief Justice.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the appellants.

Mr. *D. N. Banerji* and Pandit *Moti Lal*, for the respondents.

STRACHEY, C. J.—These two first appeals are connected appeals in connected suits, two same persons being plaintiffs and appellants in both. They are also connected with second appeals Nos. 105 and 633 of 1897, in which the same persons are plaintiffs. Each case raises the question of the rights of the plaintiffs under a purchase at an execution sale of certain zamindari property as against other purchasers who claim to have respectively bought at other sales certain portions of that property. It will be convenient to consider separately the two first appeals, as to which one judgment will suffice, as it did in the Court below.

The litigation arises out of the failure of the firm of Lachmi Narain of Bareilly. Several suits were brought against the firm by creditors, who obtained decrees. One of the decree-holders was one Kalka Prasad. He put in execution his decree against Ram Sarup and Piere Lal, the representatives of the debtor

(1) (1892) 1 L. R. 17 Bom., 375.

(2) (1893) 2 Calc., W. N., 589.

(3) (1874) 11 Bom., H. C. Rep., 193.

(4) (1892) 1 L. R., 20 Calc., 25.

(5) (1887) L. R., 15 I. A., 12.

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Lachmi Narain, and on the 20th November, 1885, there were sold in execution of the decree the rights and interests of the judgment-debtors in a village called Saidpur, or Saidpur Hawkins, and the rights and interests were purchased by the plaintiffs. One of the questions raised by the appeals is as to the exact extent of the interest acquired by the plaintiffs by that purchase, and whether it included the portions claimed by the defendants. At all events, it included the twenty bi-was share of the judgment-debtors in manza Saidpur. Objections were raised to the sale by the judgment-debtors on the ground of irregularity in publishing or conducting it under section 311 of the Code of Civil Procedure. The Court executing the decree allowed the objections and set aside the sale on the ground that the notification of sale was so vague in its description of the property to be sold as to be misleading to intending purchasers. That order was passed on the 5th May, 1886. Under the Code as it then stood no appeal lay from the order of the executing Court, but under the decisions of this and other High Courts a *regrist* suit lay at the instance of the auction purchasers to set aside the order and to have the sale confirmed. Before, however, anything was done to question that order, certain portions of the village Saidpur were, on the 20th September, 1886, sold in execution of other decrees passed against the same judgment-debtors. One of these was a decree of Kunwar Harcharan Lal. In execution of that decree two pieces of property were sold. One portion, described as "Hawkins Kothi, with inclosure and land," was purchased by Damodar Das, the respondent in F. A. No. 113. Another, described as "Begam Bagh, with masonry inclosure and kothi therein, and land," with other details not necessary to state, was purchased by Jagat Narain, the respondent in F. A. No. 115. On the 4th December, 1886, both sales were confirmed under section 312 of the Code, and in February, 1887, the purchasers obtained possession. It is under these sales that the defendants-respondents resist the claim of the plaintiffs-appellants to possession of these plots by virtue of the sale of the 20th November, 1885. That sale, it will be remembered, had been set aside on the 5th May, 1886. On the 20th September, 1886, that is, on the very day of the purchases by the defendants, the plaintiffs brought a suit to set aside the

order of the 5th May, 1886, and for confirmation of their sale of the 20th November, 1885. It has not been contended that by reason of that suit the defendants' purchases are affected by the doctrine of *lis pendens*. That contention could not have been successfully raised; first, because there is no evidence to show that at the time of the sale of the 20th September, 1886, the suit instituted on that date had already been filed; and, secondly, because, even assuming the institution of the suit to have come first, it clearly had not become "contentious" within the construction placed by this Court and other High Courts upon section 52 of the Transfer of Property Act, 1882, at the time of the sale on the same day. The only persons whom the plaintiffs made parties defendants to that suit were the judgment-debtors whose property had been sold. They never made the present defendants parties to that suit, although the Court pointed out the advisability of their so doing if they claimed these portions of the property which the defendants had purchased on the 20th September, 1886. The defendants to that suit, the judgment-debtors, filed written statements confessing judgment. Nevertheless on the 7th March, 1887, the Court of first instance dismissed the suit on the ground that the plaintiff persistently refused to specifically answer that Court's inquiry as to the particulars of the property which they claimed to have purchased on the 20th November, 1885, and more especially whether they claimed that that sale included the khati and gardens subsequently purchased by the defendants. From that decision the plaintiffs appealed to the High Court, which, on the 14th May, 1888, reversed the first Court's decree and allowed the claim. The judgment and decree of the High Court in the first place awarded the plaintiffs "possession of the property in suit, to wit, mauza Saidpur together with the groves." Secondly, it "declared that the auction-sale in favour of the appellant dated the 20th November, 1885, was a good auction-sale, and that the property as aforesaid sold thereat was purchased by them." In September, 1888, the plaintiffs obtained formal possession of mauza Saidpur in execution of the High Court's decree. They were resisted in obtaining possession of the plots which the defendants had purchased; and hence these suits, the first against Jagat Narain for possession of Begam Bagli (F. A.

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No. 115), the second against Damodar for possession of Hawkins Kothi (F. A. No. 116).

The case of the plaintiffs is that these properties passed to them under their prior purchase of the 20th November, 1885, which they say was confirmed by the High Court with the effect that the confirmation related back to the date of the sale, and therefore their purchase of the 20th November, 1885, must be given priority over the defendants' purchase of September, 1886. The case of the defendants is, first, that Hawkins Kothi and Begam Bagh were not in fact included in the execution sale to the plaintiffs of November, 1885, and, secondly, that that sale was never validly confirmed as regards them, and is not entitled to priority over the sale under which they purchased.

The Court of first instance decided in favour of the defendants and dismissed the suits.

The first question to be considered in these appeals is whether the execution sale of the 20th November, 1885, in fact included Hawkins Kothi and Begam Bagh. The sale notification describes the property as "mauza Saidpur Hawkins." It describes the judgment-debtors' interest as "20 biswas with gardens belonging to Ram Sarup and Piare Lal." Hawkins Kothi is a piece of land surrounded by a wall, and including a kothi or house, certain out-houses, and certain lands cultivated by tenants. Begam Bagh is another inclosure consisting mainly of a garden, but also apparently including a kothi. There is no doubt that both Hawkins Kothi and Begam Bagh are included within the area of the village Saidpur. Everything which can be described as gardens is expressly included in the sale notification. I think there can be no doubt that, apart from buildings, all land and especially all land cultivated by tenants, included within the area of the zamindari would *prima facie* pass by a conveyance or execution sale of the zamindari. The only question I think is as to the kothis and the out-houses attached to them. As to these I have no doubt whatever that it was fully intended that they should be sold with the rest of Saidpur. They are specifically mentioned in the application for execution and in the warrant of attachment. I do not agree with the view of the Subordinate Judge that the kothis were not actually attached. He bases that view on the

amin's report in which the amin stated that he had attached "the zamindari property." But the report itself expressly refers to a list appended to it, which specifically include in the attached property the kothis and gardens, and I think that shows clearly that those properties were in fact included in the report. The defendant's explanation of the omission of the kothis and gardens from the description of the property sold is that the amin's report did not include them. The Judge of the Court which heard the case at first instance stated his opinion to be that the kothis and gardens were included in the property sold, though it held that that did not appear with sufficient clearness from the description of the property, and that the absence of specific mention was misleading. Now in the entire absence of evidence to the contrary, I think that a kothi or other building situated within the zamindari area is included in and passes with the zamindari. No doubt the contrary may be shown by evidence, but it is to say, evidence of the circumstances connected with the acquisition, construction, or use of the building, from which it may properly be inferred that they are not appurtenances of the zamindari, but have been so severed or held so separately from it as to form a separate and distinct property of the zamindar. In the present case there is no such evidence. The village Saidpur was purchased by Lachmi Narain in 1861. There is in evidence an account book of the firm showing that at the same time there was purchased a kothi or kothis separately valued. It is impossible to say from this document whether the singular word "kothi" or the plural "kothis" is designated. Further, there is nothing to show, if the document referred to one kothi, which, if either, of the kothis concerned in this suit is referred to. There is no evidence showing for what purpose or in what manner either the kothi in Hawkins Kothi or the kothi in Begam Bagh was used at any time up to the sale of the 20th November, 1885. Therefore in the absence of any evidence to the contrary I hold that the kothis and the out-houses as well as the gardens and cultivatory holdings, passed with the rest of the zamindari of mauza Saidpur by the sale of the 20th November, 1885.

The next question relates to the validity of that sale, and as to this defendants raise two contentions. First, they say that at the

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date of their purchase of the 20th September, 1886, the plaintiffs' purchase having been set aside, they, the defendants, took Hawkins Kothi and Begam Bagh absolutely and not subject to any rights then existing in the plaintiffs. Secondly, they contend that, so far as they are concerned, the sale of the 20th November, 1885, must be deemed to be a sale which was never confirmed, inasmuch as the confirming decree of May, 1888, was passed in a suit to which they were not parties, and by means of collusion between the plaintiffs and the judgment-debtors who were the sole defendants.

In reference to the first of these contentions the plaintiffs seek to establish an analogy between the decree of 1888 and an ordinary order confirming a sale under section 312 of the Code. It has been held in several cases that an auction purchaser at an execution sale has prior to confirmation under section 312, an inchoate or equitable title which becomes absolute on confirmation, that any subsequent purchaser, even if the subsequent purchase is first confirmed, takes subject to this inchoate title of the first purchaser, and that on confirmation the title to the property, as between different auction purchasers under different sales, relates back to the date of the sale. In support of this contention the plaintiffs rely on *Dagdu v. Paanchamsing Gangaram* (1), *Konapa v. Samardan* (2) and a case reported in 2 Calcutta Weekly Notes, p. 589. When these cases are looked at there is one obvious matter in which they are distinguishable from the present. In all of them at the time of the second purchase the first had not been set aside but was in force. All of them proceed on the principle that at the time of the second purchase there existed in the first purchaser under a subsisting sale an inchoate title, which only awaited confirmation of the sale to become a complete title. In each of these cases the second purchaser bought subject to that inchoate title which only awaited confirmation. In the present case at the time of the second sale to the defendants the sale to the plaintiffs had been set aside for many months. If that sale was set aside, and was not subsisting at the date of the defendants' purchase, how can it be said that at that date any inchoate title in the plaintiffs existed? The inchoate title depends on the sale,

(1) (1892) 1 L. R., 17 Bom., 375. (2) (1874) 11 Bom. H. C. Rep., 193.

and can exist only as long as the sale is in force. If on the 20th September, 1886, the sale had gone and the inchoate title of the plaintiffs under it had therefore gone, the defendants did not purchase subject to it. Can it be said that the inchoate title still existed, although the sale giving rise to it had been set aside, merely because there was a possibility of a suit being brought by the auction purchasers for reversal of the order setting aside the sale and for confirmation of the sale itself? I am disposed to agree that the confirmation constituted by the decree would relate back to the date of the sale and make the sale valid *ab initio quoad* the judgment-debtors. But can it do so in such a manner as to defeat intermediate purchasers who have purchased *bond fide* at a time when the sale was set aside, and under valid decrees, and in valid auction sales of their own? No case, it is admitted, has carried the doctrine of inchoate title so far as this. The plaintiffs rely on the analogy of the case of *Ram Chunder Sudhu Khan v. Samir Gazi* (1), and in particular on the passage at p. 28, where it is said :—"The effect of the subsequent dismissal of the suit to set aside the sale was the same as if it had been dismissed in the first instance, and as if the first sale had never been set aside." The learned Judges give no reasons for that opinion; but I think it sufficient to say of that case that the circumstances of it were in several particulars different from the present, and that it was decided under the provisions of the Bengal Rent Act VIII of 1869. If we are to go by analogy, I think a more instructive analogy is to be found in the judgment of their Lordships of the Privy Council in the case of *Nawab Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* (2), where it was laid down that the title of a *bond fide* purchaser in execution of a decree which at that time was valid and in force is not affected by the circumstance that the decree is afterwards set aside on appeal as erroneous. I have not arrived at this conclusion without some doubt, because unquestionably there are difficulties in any view of the conflicting rights of these two auction purchasers. It is possible, for instance, that questions of some difficulty might arise if the competition were between an auction purchaser buying after the previous sale had been set aside, and the prior auction purchaser, who, after the

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(1) (1892) 1 L. R., 29 Cal., 25.

(2) (1887) E. R., 15 L. J., 12.

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second sale, obtained on appeal a reversal of the order setting his sale aside. As to which of the two auction purchasers would in that case be entitled to priority, I need express no opinion, though I acknowledge that in favour of the prior auction purchaser it might plausibly be contended that to deny him priority would have the effect of rendering nugatory the right of appeal now given to him by section 588(16) of the Code. That difficulty I prefer to deal with when it arises. On the other side, however, I think there are still greater difficulties, and in particular the difficulty and objection resulting from the long period of uncertainty and suspense in which it would be impossible practically to say whether property might safely be sold in execution of a decree. The previous sale having been set aside, a suit for confirmation of the sale and for reversal of the order setting aside the sale might be brought at any time up to a year from the date of the order: the suit might conceivably be a protracted one and go through the whole course of appeal possible in India, and ultimately to the Privy Council; and the question would arise whether the title of auction purchaser and transferees from those purchasers, and even further transferees again in the period between the setting aside of the order and the institution of the suit should for the whole of that protracted period be subject to every sort of uncertainty. But the greatest difficulty to my mind is in holding that there remains an inchoate title when the sale has been set aside and when all that remains to the plaintiff is the possibility of bringing a suit to have the reversal of the sale itself set aside. The defendants were *bona fide* purchasers of these plots at a time when I cannot hold that the plaintiff had any title to them whatever, and for that reason I think that the defendants' priority is entitled to priority and that the suit must fail.

That would be sufficient to dispose of these suits, but that I understand that my brother Banerji has some doubts on the matters which I have so far discussed; and I do not pretend to be entirely free from doubt myself. Therefore it is necessary now to consider the second ground on which the defendants contend that even if Hawkins Kothi and Begam Bagh were included in the sale of November, 1885, the plaintiffs have not validly

acquired these properties. That second ground is that by reason of the collusive nature of the proceedings terminating with the High Court's decree of May 1888, the sale of the 20th November 1885, must be deemed never to have been confirmed *quoad* these defendants and the order of the 5th May, 1886 setting aside the sale remains standing *quoad* them. There can be no doubt that an auction purchase in execution of decree must be confirmed if it is to pass a complete title. It must be confirmed either by an order under section 312 or by a decree in a regular suit brought for the purpose. The question is whether the High Court's decree of 1888 was prevented from having been a valid confirmation by reason of collusion as alleged. The conclusion at which I have arrived is that the proceedings in that suit were collusive proceedings between the plaintiffs and the then defendants. The High Court's decree was passed solely on the ground of the confession of judgment by the then defendants in the Court of first instance. In dealing with the question of collusion it must of course be remembered that direct evidence on such a point can seldom be expected. One has to look at all the circumstances and consider what is the most probable and common sense inference to be drawn from the circumstances as a whole. Now what are the circumstances here? There was a sale to the plaintiffs in November 1885 of manzi Saidpur in which only 6,000 rupees were realized. We find the judgment-debtors objecting to that sale and getting it set aside in May 1886. From that moment the plaintiffs did absolutely nothing to impugn the order until the 20th September, 1886, which by a curious coincidence happened to be the very day when, in execution of another decree, these properties were sold to and purchased by the defendants. On that day they made an unsuccessful attempt to get the sale postponed, and having failed they purchased secretly, in the name of one Kishen Lal, the village Saidpur, which, on the same day, was sold in execution of a decree of Lalta Prasad and Gobind Prasad. On the same day they also bring their suit for confirmation of the sale of the 20th November, 1885, and against whom do they direct it? They carefully confine the suit to the judgment-debtors, who had no remaining interest whatever in the property: and I use the word "carefully" advisedly, because the circumstance of the defendants' purchases

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was pressed upon the plaintiffs' attention by the Court, which insisted in vain on an answer to the question whether they claimed Hawkins Kothi and Begam Bagh, in which event the Court considered that the present defendants ought to be made parties to the suit. They refused to say whether they sought to affect the interests of these persons or not. These persons had a real interest in opposing the suit. The judgment-debtors, who had succeeded in obtaining the order of the 5th May, 1886, filed written statements confessing judgment. Why did they do that, if they did not wish actively to assist the plaintiffs in getting the first sale restored with the minimum of opposition? If they had no defence to make to the suit, or thought they were not interested in opposing it, and if that is why they made no resistance it would have been sufficient for them to have simply let judgment go by default. One of the plaintiffs was examined as a witness in this case—the plaintiff Banks Lal. He was called by the defendants. He was cross-examined by his own counsel. There was an issue as to the collusive nature of the proceedings in the former suit. If there had been in fact no collusion in that former suit I think it would have been a natural course to have taken such a favourable opportunity of obtaining a specific denial by Banks Lal, that in the former suit there had been collusion in obtaining the confession of judgment. No such question was put, and the plaintiff's counsel confined himself to asking whether it was true that the former defendants had been induced to confess judgment by a bribe of Rs. 3,000. From all these circumstances the conclusion which I draw—of course, like most other conclusions of fact—it is only based on a balance of probabilities—is that the parties to that former suit agreed together to set up by a suit which was really a sham suit intended not to be resisted but facilitated, the sale of the 20th November, 1885, in order to defeat the present defendants, of whose purchases the plaintiffs and the judgment-debtors were of course fully aware. I agree with the Court below in not being satisfied with the evidence by which it was attempted to show an actual bribing of the then defendants. Apart from that, however, and although the bribe has not been established, I think there is sufficient ground for coming to the conclusion that the confirmation of the plaintiffs' sale was obtained

by collusion between the plaintiffs and the judgment-debtors. I would therefore dismiss both appeals and suits on the grounds, first that the defendants' purchases are, under the circumstances, entitled to priority over the plaintiffs' purchase; secondly, that, as regards the defendants, the confirmation of the plaintiffs' sale by a decree to which the defendants were not parties, and which was obtained by collusion between the plaintiffs and the judgment-debtors, cannot operate as a valid confirmation of the sale of the 20th November, 1885. For these reasons I am of opinion that both these appeals should be dismissed with costs in both Courts.

BANERJI, J.—I also am of opinion that the decrees of the Court below should be affirmed, although I am unable to agree with most of the reasons by which the judgment of that Court is supported. In the two suits out of which these appeals arise there are three questions to be considered; (1) whether the property now in suit was comprised in the auction sale of the 20th November, 1885; (2) whether the defendants have priority over the plaintiffs by reason of their having purchased the said property after the sale of the 20th November, 1885, had been set aside, and of the said sale having been confirmed by proceedings to which the defendants were not parties; (3) whether the decree of this Court of the 14th May, 1888, affirming the said sale, was obtained by means of collusion and fraud.

Holding the view which I do on the third question, I do not deem it necessary to decide the other questions. Upon those questions I must confess my mind is not free from doubt. I prefer therefore to rest my judgment on the conclusion at which I have arrived with reference to the third question. If the decree of this Court, which is the real basis of the plaintiffs' title, was fraudulently and collusively obtained, the sale at which the plaintiffs purchased never became absolute, and even if it be assumed that the property in suit was included in that sale, the plaintiffs have acquired no priority over the defendants. I am clearly of opinion that there was collusion between the plaintiffs and their debtors in the previous suit. The decree passed in that suit was based on a confession of judgment filed by the debtors. In my opinion that confession of judgment was the result of a concert

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between the parties to that suit, the object of which was to defeat the intermediate purchasers, the defendants. The oral evidence adduced to prove the existence of a concert has been disbelieved by the Court below, and I must say that I see no sufficient reasons for disagreeing with that Court as to its estimate of that evidence. But fraud and collusion are from their very nature not ordinarily capable of being proved by direct evidence. A party imputing fraud to a transaction is no doubt bound to establish it, but he is not bound to do so in the great majority of cases by means of direct evidence only.

Now let us see what were the circumstances in this case. The sale of the 20th November, 1885, was set aside on the objection of the judgment-debtors on the 5th May, 1886. For several months after that date the plaintiffs took no steps to obtain the record of the order setting aside the sale. It was only when they had found that other debtors of the judgment-debtors had caused some of the property of the judgment-debtors to be advertised for sale, and when the actual date fixed for the sale, namely, the 20th September, 1886, had arrived, that they brought a civil suit to have the order of the 5th May, 1886, set aside, and the sale of the 20th November, 1885, confirmed. The very fact of their having made this delay in the institution of their suit raises doubts as to the *bona fides* of the suit, and these doubts are strengthened by the fact that a large portion of the property sold on the 20th November, 1885, was subsequently purchased by these plaintiffs themselves on the 20th September, 1886, benamed in the name of one Kishen Lal. The evidence to which the Court below has referred leaves no room for doubt that the purchase by Kishen Lal was in reality a purchase by the plaintiffs. It appears that the plaintiffs made some attempt on the 20th September, 1886, to avert a sale, but they failed in that attempt because the Court refused to grant their prayer for the postponement of the sale. After the sale had taken place and the defendants had purchased the property now in dispute, what did the plaintiffs do? Although the Court repeatedly called upon them to declare in distinct terms whether their suit embraced the property purchased by the defendants, namely, Hawkins Kothi

and Begam Bagh, they gave no direct answer to the Court's inquiry, and although they were aware that their judgment-debtors had ceased to have any interest in that property, they preferred to continue their suit against their judgment-debtors alone, and did not accept the suggestion of the Court that the auction-purchasers should be added as parties. The next thing we find is that on the 20th November, 1886, that is, two days before the date fixed for the hearing of the case, the defendants appeared in Court and filed a petition, confessing judgment. We know that the defendants to that suit, namely, the judgment-debtors, had strenuously contested the validity of the auction sale of the 20th November, 1885, and had actually got that sale set aside on the ground of irregularity and inadequacy of price. We find that at the subsequent sale which took place on the 20th September, 1886, the property sold yielded a price which was more than double of that realized at the first sale, and yet we find that the judgment-debtors, who evidently benefited by the second sale, which enabled them to discharge a large portion of their debts, appear in Court and do an act which would facilitate the passing of a decree in favour of the plaintiffs. What could be their motive in confessing judgment on the 20th November, 1886? It is difficult to conceive that they had any other motive than that of enabling the plaintiffs to obtain a decree and thereby to defeat the interests of the defendants. As I have said, the judgment-debtors had a substantial interest in opposing the plaintiffs' suit and in obtaining an affirmance of the order setting aside the sale of the 20th November, 1885; but when, in spite of that interest, they admitted the justness of the plaintiff's claim, it is difficult to draw any other inference than what I have stated above. As their property had passed into the hands of purchasers, it was not difficult to induce them to join the plaintiffs in colluding with them and perpetrating a fraud on the defendants, the second purchasers. Having regard to these considerations I think the Court below rightly held that the confession of judgment, which was the only foundation of the decree of this Court of the 14th May, 1888, was filed collusively and fraudulently, and that that decree had not the effect of affirming as against the defendants the prior sale of the 20th

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November, 1887. That being so, the plaintiffs have not acquired by virtue of that decree any priority as against the defendants, and the plaintiffs' suit has been rightly dismissed.

Appeal dismissed.

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Before Sir Acton St. John, Knight, Chief Justice and Mr. Justice Banerji.
RAGHUBAR DAYAL (DEFENDANT) v. BANK LAL AND OTHERS (PLAINTIFFS).
Execution of decree—Procedure—Act No. XII of 1881 (N.W.P. Rent Act), Sections 170, 171, 172—Civil Procedure Code, Sections 4A, 285, 295—Civil and Revenue Courts

Held that the procedure prescribed by section 285 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court.

If now when the same property had been attached both by a Court of Revenue and by a Civil Court, but was first brought to sale by the Court of Revenue, the sale of the property purchased at the sale held in execution of the decree of that Court would not be valid as against the purchaser at the sale held in execution of a decree of the Civil Court. *Order Singh v. Bhup Singh* (1), *Shree Das v. Dew Dagar* (2), and *Madho Prakash Singh v. Murli Prasad* (3) referred to.

The facts of this case are fully stated in the judgment of the Chief Justice.

The Hon'ble Mr. Conlan, Mr. E. Chamber and Munshi Gobind Prasad, for the appellant.

Messrs. D. N. Banerji and A. E. Ryres, and Pandit Sundar Lal, for the respondents.

STRACHLEY, C. J.—This appeal is connected with first appeals Nos. 115 and 116 of 1898, and second appeal No. 405 of 1897, in which we have just given judgment. The plaintiffs-respondents here are the persons who were plaintiffs in those cases. They claim by virtue of the same execution sale of the 26th November 1885, of mauza Saidpur that we have discussed in our previous judgments. The defendant-appellant purchased certain property included in Saidpur in execution of a Revenue Court's decree obtained by himself against the same judgment-

Second Appeal No. 405 of 1897, from a decree of H. J. Kitts, Esq., District Judge of Benares, dated the 17th March 1897, reversing the decree of Babu Madho Das, Subordinate Judge of Benares, dated the 27th November 1896.

(1) (1891) I. L. R., 16 All., 493.

(2) (1899) I. L. R., 21 All., 405.

(3) (1883) I. L. R., 5 All., 406.

debtors for a share of the profits village Saidpur, under section 93(h) of the N.-W. P. Rent Act, 1881. His purchase took place on the 3rd November, 1885. It has been suggested during the hearing of this appeal that that purchase was set aside and remained set aside at the date of the plaintiffs' subsequent purchase of the 20th November, 1885. No such suggestion appears to have been made in either of the Courts below, where the whole case proceeded on the assumption that the purchase of the defendant was in force on the 20th November, 1885, when the plaintiffs purchased. We must proceed upon that view here. The defendant obtained possession in July, 1886. The plaintiffs' purchase of the 20th November, 1885 was set aside on the 5th May, 1886, but was ultimately confirmed in a suit brought by them for the purpose against their judgment-debtors only, by an appellate decree of this Court in May, 1888, under circumstances which are fully stated in our judgments in the first appeals. In the present suit the plaintiffs' claim is for possession of three properties, known respectively as the Sagbari garden, Nauda Bagh, and Safri Bigh. The suit was decreed on appeal by the lower appellate Court, and from that decision the defendant now appeals.

The first question discussed in this appeal was as to the effect of a judgment of the District Judge of Bareilly passed on the 24th January 1890. That was a suit brought by the plaintiffs for mesne profits of the village Saidpur. The present defendant-appellant was made a defendant to that suit under section 32 of the Code of Civil Procedure, inasmuch as he alleged that part of the mesne profits claimed were profits of the property which he had purchased on the 3rd of November, 1885, and he contended that inasmuch as he had purchased that property the plaintiffs had no right to any profits arising from it from the date of that sale. It is conceded that the decree of the District Judge decided between the present plaintiffs and the present defendant that the land did not pass to the present defendant under the sale of the 3rd November, 1885. If anything passed it was the trees and such rights over the land as were necessary for the defendant's enjoyment of the trees. I think therefore that the lower appellate Court was right in decreeing the present claim so far as the

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land is concerned. That was finally decided between the parties by the decree of the 24th January, 1890. There remains the right of the defendant in respect of the trees. As to this the matter was not, in my opinion, determined by the decree of the 24th January, 1890, and remains open. That was a suit for mesne profits arising out of the land, and there was no real issue as to the ownership of the trees. Now, confining the case to the trees, the defendant's purchase was prior in date to that of the plaintiffs'. The lower appellate Court has nevertheless held that the plaintiffs' purchase was entitled to priority on two grounds. The first ground is that, having regard to section 285 of the Code of Civil Procedure, the Revenue Court had no jurisdiction to sell the property on the 3rd November, 1885, as it was already under attachment by a Civil Court in execution of Kalka Prasad's decree, under which the plaintiffs ultimately purchased. The second ground is that the defendant's purchase was invalid by reason of section 171 of the Rent Act, as it was not shown that the judgment-debtor, before applying for execution against the immovable property, had failed to obtain satisfaction of the decree by execution against the person or movable property of the debtor.

I propose to consider first the second of these grounds. I think that the decision of the lower appellate Court is wrong. The immovable property against which execution was applied for was not a mahal or a share of a mahal. Section 172 of the Rent Act therefore governed the execution. That section makes applicable, amongst other provisions, the provisions of section 170 relating to movable property, and section 170 provides that "no irregularity in publishing or conducting a sale of any movable property under an execution shall vitiate such sale." By reason of section 172 it follows that the irregularity under section 171 would not vitiate the sale of this immovable property. The non-compliance with the provisions of section 171 was not, I think, more than an irregularity. Apart from the objection under section 285 of the Code, the Revenue Court had undoubted jurisdiction in the matter. As the sale of the 3rd November, 1885, was not vitiated by the irregularity, the first ground upon which the lower appellate Court has given priority to the plaintiffs' subsequent purchase in my opinion fails.

The second point is the point relating to section 285 of the Code. That section provides that "where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached." There has been much discussion on the question whether the word "decrees" in this section would include a decree of a Revenue Court. It was contended on behalf of the defendant that the expression, having regard to the definition of "decree" in section 2, must be read as limited to a decree of a Civil Court, and reliance was placed on the decision of this Court in *Onkar Singh v. Bhup Singh* (1) and *Aulia Bibi v. Abu Jafar* (2). Those decisions must be read with the decision of the Full Bench of this Court in *Madho Prakash Singh v. Murli Munohar* (3). The two later cases relate, one of them to injunctions under section 492 of the Code against the sale of property under a Revenue Court decree, the other to the attachment and sale of a Revenue Court decree under section 273. They had nothing to do with any question of the procedure by which Revenue Courts are governed. The Full Bench decision dealt with that question, and established that the Revenue Courts are bound in their procedure by the provisions of the Code of Civil Procedure in matters as to which the Rent Act is silent. Section 285 is a section prescribing certain procedure in the execution of decrees; and having regard to the observations of the majority in the Full Bench case, I think that section 285 would govern the procedure of Revenue Courts, at all events to this extent, that if property is attached in execution of decrees of more Revenue Courts than one, the provisions of the section would have to be complied with by those Courts, just as the Civil Courts would be bound if the property were attached in execution of decrees of more Civil Courts than one. But here the property was attached in execution of a decree of a Revenue

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(1) (1894) I. L. R., 16 All., 496.

(2) (1899) I. L. R., 21 All., 405.

(3) (1883) I. L. R., 5 All., 406.

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Court, and also of a decree of a Civil Court, and the question is whether the procedure of the section can be applied as between those two Courts as if they were Courts of the same character. When the procedure of section 285 is followed, and assets realized by sale in execution, then the different decree-holders obtain a rateable distribution of the assets under section 295, and section 295 makes it necessary that prior to the realization they should have applied for execution to the Court by which such assets are held. For the purpose of obtaining the benefit of the section, and to enable an application for execution to be made to the Court holding the assets, it is necessary for holders of decrees passed by other Courts to obtain the transfer of those decrees for execution from those Courts to the Court which is to realize the property. Such applications for transfer for that purpose are made under section 223. Now so far as I know there is no case in which these sections have been applied indiscriminately as between Civil Courts and Revenue Courts, that is to say, no case has been pointed out to us in which section 285 has been applied when property has been attached in execution of a Civil Court decree and also of a Revenue Court decree. Similarly, no case has been pointed out to us in which, for the purposes of section 285 and section 295 or otherwise, a Revenue Court decree has been transferred for execution to a Civil Court or *vice versa*. The principle that, in matters as to which the Rent Act is silent, the Revenue Courts are to be governed by the Code of Civil Procedure must, I think, be applied subject to the broad line of demarcation between the functions of the Civil and Revenue Courts which the Legislature has drawn, and we must not so apply it as to confound the functions of these widely different kinds of Courts, or to make one class of Court encroach upon the province of the other. Now when the provisions of the Code and those of the Rent Act relating to execution of decrees are compared, very great differences are noticeable. It is only necessary to mention a few. Under section 170 of the Rent Act no irregularity in publishing or conducting a sale under an execution is to vitiate the sale and by section 172 that applies to immovable as well as to movable property. Then there is section 171, to which I have already referred, and which makes

it necessary for a judgment-creditor to attempt to obtain satisfaction against the person or movable property of the judgment-debtor before he can apply for execution against any immovable property. There are also provisions (see the sections beginning with section 178) greatly differing from those of the Code as to claims made by third parties to property which has been attached and whose sale is contemplated. Many other differences might be mentioned. Now if section 285 of the Code is to be applied to cases where property is attached in execution of both Civil and Revenue Court decrees, how are we to deal with differences of this kind? Suppose, first, that it is the Civil Court which has to undertake the execution. It must presumably deal with any objections made to the attachment under the Revenue Court's decree, for that attachment is not affected by the fact that another Court conducts the sale. If, for instance, the judgment-debtor, under the Rent Court's decree, objects to the attachment on the ground that it is in violation of section 171 of the Rent Act, is the Civil Court to give effect to that objection? If yes, it becomes *pro tanto* a Revenue Court, it has to apply a procedure which the Rent Act shows the Legislature intended should be applicable to Revenue Courts alone. If no, the judgment-debtor loses the right which the Rent Act gives him, and the execution is validated so far as the Revenue Court's decree is concerned, merely because a Civil Court decree also happens to have been passed. On the other hand, suppose that the Court conducting the execution is a Revenue Court. In dealing with objections or claims, is it to ignore the procedure prescribed by Chapter VII of the Rent Act, and to adopt in its place the different procedure of the Code? Considerations of this kind lead me to the conclusion that it was not intended to apply sections like section 285 of the Code as between a Revenue Court on the one hand and a Civil Court on the other. If so, then there was nothing that on the 3rd November 1885, prevented the Revenue Court from selling the property, that is to say, the trees, to the defendant-appellant. In that view the title passed to the defendant under that sale, and, so far as regards the trees, the plaintiffs took nothing by their subsequent purchase of the 20th November, 1885, even assuming that sale to have been

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validly confirmed by the High Court's decree of May 1888. The suit therefore should have been dismissed as regards the trees, and decreed as regards the land of the three properties which I have mentioned. I think that the proper decree to pass now is that the appeal should be dismissed as regards the land, and that it should be allowed as regards the trees, and that the parties should pay and receive costs in proportion to their failure and success.

BANERJI, J.—I concur in the order proposed by the learned Chief Justice. The plaintiffs' suit embraced two claims, first, a claim in regard to the land covered by the trees in the three groves in question; and, secondly, a claim in regard to the trees. As for the land, it is conceded by the learned counsel for the appellant that the decree of the 24th January 1890, operates as *res judicata*. As regards the trees, I am unable to accept the contention of Mr. Conlan, that the judgment in the suit in which the said decree was passed has the effect of *res judicata* in respect of the trees also. That judgment was passed in a suit for mesne profits arising out of the land only. The question of the ownership of the trees was not a question directly and substantially in issue in that suit. Therefore any opinion which the Court may have expressed in that suit in regard to the title to the trees cannot operate as *res judicata* and the question as to the ownership of the trees was a question which the Courts below were bound to determine in this case. The purchase by the defendant being in point of time prior to the purchase by the plaintiffs, the defendant would have priority of title, unless that title could be defeated on any ground. The lower appellate Court holds that the Court of Revenue was not competent to sell the groves, because there existed on the groves a prior attachment by a Civil Court, and it relies for its conclusion on section 285 of the Code of Civil Procedure. I agree with the learned Chief Justice in thinking that the Court below has erroneously held that section 285 precluded the Revenue Court from selling the property in question. Having regard to the ruling of the Full Bench in *Madho Prakash Singh v. Murlī Mañohar* (1) and the provisions of section 4A of the Code of Civil Procedure, it is beyond doubt that in regard to matters of procedure as to which the Rent Act

(1) (1883) I. L. R., 5 All., 406.

does not contain specific provisions the Courts of Revenue are to apply the procedure of the Code of Civil Procedure. This means that as regards cases pending in Courts of Revenue the procedure should, where the Code of Civil Procedure applies, be that prescribed by that Code. But it does not follow that where the procedure of the Code of Civil Procedure applies to Courts of Revenue, those Courts should, for all purposes, be deemed to be on the same footing as ordinary Civil Courts. The Courts of Revenue are Courts of exclusive jurisdiction competent to try suits of a specific class. As regards such suits the jurisdiction of Civil Courts is excluded by the provisions of sections 93 and 95 of the Rent Act. The Legislature could not certainly have contemplated that while Civil Court should have no jurisdiction to try suits and applications of the descriptions specified in those sections, they should be competent to determine questions relating to execution arising out of such suits and applications. Where, according to the Full Bench ruling of this Court, a Court of Revenue is to apply the provisions of the Code of Civil Procedure, that procedure is applicable to proceedings pending in the Court of Revenue. In this view section 285 of the Code of Civil Procedure would so far govern proceedings in Courts of Revenue that where the same property is attached by more Courts of Revenue than one, the property is to be realized by the Court indicated by that section, namely, where a difference of grade exists between the different Courts of Revenue, by the Court of the highest grade, and where no difference exists between such Courts, by the Court which first attached the property. But I am unable to hold that where the same property has been attached both by a Civil Court and by a Court of Revenue the procedure of section 285 would apply. That section was enacted to put an end to the difficulties which used to arise under section 271 of Act VIII of 1859, and the object of the section is, that where several Civil Courts attach the same property, it shall be realized by one Court only, the remedy of the different judgment-creditors who obtained the several attachments being that provided by section 295. Now in order to enable a decree-holder to obtain a rateable distribution under that section he would have to apply to the Court which is to realize the assets for execution of

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his decree. Certainly the holder of a decree of a Revenue Court cannot apply to a Civil Court for the execution of his decree, and I am unable to hold that by virtue of section 223 of the Code a decree of a Court of Revenue can be transferred to a Civil Court for execution. Having regard to the policy of the Rent Act it cannot be conceived that it was ever intended that a decree of a Court of Revenue should be executed by a Civil Court. In my long experience I have never seen any instance of a decree of a Revenue Court having been transferred to a Civil Court for execution, or a decree of a Civil Court transferred to a Court of Revenue. Of course the fact of such transfers never having taken place does not necessarily lead to the conclusion that the power to make the transfer does not exist; but, as I have said above, I am of opinion that it was never contemplated by the Legislature that a Civil Court should execute a decree of a Court of Revenue. This affords a sufficient answer to the contention that section 285 applies to a Court of Revenue in the sense that where property has been attached by a Civil Court and by a Court of Revenue, the Court in pursuance of whose order the attachment was first made, should realize the property, whether that Court was a Civil Court or a Court of Revenue. I agree with the learned Chief Justice in holding that the Court below was wrong in its conclusion that by reason of section 285 the Court of Revenue was not competent to sell the property in question on the 3rd November 1885. The mere fact of a previous attachment existing over the property did not preclude the sale of it in pursuance of another attachment by a Court of a different class. The only other ground on which the learned Judge of the lower appellate Court has held the defendant's purchase to be void is that, under section 171 of the Rent Act, the defendant was bound to show that he could not get satisfaction of the decree obtained by him by execution against the movable property of his debtors before he could sell their immovable property. On this point I am in full accord with the opinion expressed by the learned Chief Justice. In this view the question of collusion and fraud in respect of the decree of this Court, dated the 14th May 1888, does not arise.

Decree modified.

PRIVY COUNCIL.

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ROSHAN SINGH (PLAINTIFF) v. BALWANT SINGH (DEFENDANT),

On Appeal from the High Court for the North-Western Provinces.

Hindu law—Right of illegitimate son to maintenance only

In the regenerate classes of Hindus a son of illegitimate birth has no part in the family maintenance, but is entitled to maintenance out of his father's estate,—a right personal to him and not inherited by his offspring. *Chotary v. Ran Jharna Singh v. Salub Perinlad Singh* (1) referred to and followed.—

An allowance for maintenance was received by the plaintiff's father, that father having been an illegitimate son born to a collateral relation of the head of a family. The ancestral property was in the possession of the latter, who was in a senior line of descent.

The plaintiff, who was himself the legitimate son of his father, claimed to be entitled to redeem a mortgage of part of the ancestral estate, that mortgage having been effected by the above-mentioned head of the family. His ground of claim was that he had inherited the right to maintenance and had thus an interest or charge within the meaning of section 91 of the Transfer of Property Act, 1881, to entitle him to redeem.

The decision was that the High Court had rightly concluded that he had not inherited that right. The authority of the *Mitalshara* in Chap. 1, sections 11 and 12, was more consistent with a personal right of the illegitimate son.

APPEAL from a decree (2) (18th February 1893) of the High Court reversing a decree (31st March 1894) of the Subordinate Judge of Aligarh.

The plaintiff-appellant, suing in 1893 as a pauper, claimed to be declared entitled to redeem a mortgage of forty-three villages, part of the Husain talukh in the Aligarh district, and comprised within the zemindari formerly possessed by Narain Singh, who made the mortgage on the 30th August 1833, and died in October 1844. The plaintiff's deceased father, Bhoj Singh, was the illegitimate son of Indarjit Singh, who was grandson of Mittar Singh. Narain Singh, who had inherited the ancestral estate, was another grandson of the same.

The mortgagee was Pitambar Singh, who died in November 1845, leaving a minor son. The present successor in title to them was Balwant Singh, now the defendant-respondent.

The mortgagor left no son; his two widows, Mohar Kunwar and Sengar Kunwar, succeeded to the estate. They sued, but failed

Present:—The LORD CHANCELLOR, LORDS HOBHOUSE, MORRIS, DAVEY and ROBERTSON and SIR RICHARD COUCH.

(1) (1857) 7 Moo., L. A., 13. (2) L. L. R., 18 All., 253.

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to get possession of the mortgaged property. In 1868 Bhoj Singh sued a predecessor of the present respondent for the same, but he was found by two Courts in concurrence to be an illegitimate son, and his suit was dismissed. As to this in the present suit the High Court, on the judgment now appealed from, referring to this dismissal, and the reason for it, observed that the question whether this question of his legitimacy or illegitimacy was a cause already adjudged had been held so to be by the Subordinate Judge, and had not been challenged before them.

The plaint alleged that Sanwant Singh, father of Indarjit, and grandfather of Bhoj Singh, had received a malikana allowance of Rs. 457 paid by the head of the family, and that the plaintiff, son of Bhoj Singh, was the sole surviving heir of Narain Singh; but that if it were found that the plaintiff's father, Bhoj, was of illegitimate birth, still the Husain estate had been liable for his maintenance, and that for this reason "they had acquired a right to redeem the property mortgaged."

The defendant in his written statement pleaded that it had been established in the suit of 1868 that the plaintiff's father was not of legitimate birth, and that the ancestors of the plaintiff had never been allowed to have any villages, or malikana, out of the family estate. Among other issues the following were fixed: whether the plaintiff's predecessors had received, and the plaintiff was entitled to, maintenance from the family estate, and whether the latter was entitled to redeem the mortgage of 1838. These were also the questions which the appellant sought to raise on this appeal. The Subordinate Judge decreed the claim to redeem, and redemption upon payment of Rs. 51,000. His view was that the plaintiff had a right to redeem, notwithstanding the fact that his father was of illegitimate birth. He found that Bhoj Singh, and his father and grandfather before him, had received maintenance out of the family property in the shape of a malikana allowance of Rs. 457 per annum, to which the plaintiff as the legitimate son of his illegitimate father was clearly entitled in lieu of his "charge for maintenance" upon the Husain estate; and that he was in consequence a person who had an interest in the right to redeem mortgaged property, and hence was entitled to redeem the mortgage in suit under

section 91 of the Transfer of Property Act (Act No. IV of 1882).

On an appeal heard by a Division Bench (BANERJI and AIKMAN, JJ.) the Judges reversed the above decision. They said in their Judgment:—"Assuming that the plaintiff is entitled "to maintenance from the Husain estate, that right to obtain "maintenance cannot, in the absence of a contract or of a decree "of Court making the maintenance a lien on the estate, be regarded "as a charge on the estate within the meaning of sections 91 and "100 of Act No. IV of 1882, as was held in *Kunwar Sham Singh v. Raja Balwant Singh and others*, F. A., No. 295 of "1893, decided by this Court on the 11th June, 1895. It is "urged before us that although the plaintiff may not have a "charge on the property in question, he has an interest in it, inas- "much as his father, Bhoj Singh, was entitled to a malikana "allowance in lieu of his maintenance. There is nothing before "us to show that if Bhoj Singh was entitled to maintenance or to "a malikana allowance in lieu of maintenance, that allowance "was one which was not limited to the term of his life, but was "heritable by his son. According to Hindu law, an illegitimate "son of a person belonging to one of the three regenerate "classes is entitled, if docile, to obtain maintenance from his "father. No authority has been shown to us for holding that "this is anything but a personal right. Therefore, even if it be "assumed that Bhoj Singh was granted a malikana allowance in "lieu of his maintenance, it would not follow that that allowance "would pass to his son. The Subordinate Judge was clearly in "error in holding that the plaintiff was entitled to the malikana "allowance which Bhoj Singh is said to have enjoyed. Conse- "quently the plaintiff has no right to redeem the mortgage in "question. This is sufficient to dispose of this suit. The plaintiff "having no right of redemption, his suit should have been "dismissed. We allow the appeal and dismiss the plaintiff's "suit, with costs here and in the Court below."

Sir W. H. Rattigan, Q. C. and Mr. C. W. Arathoon, for the appellant, argued that the result at which the Subordinate Judge's judgment had arrived was correct, and that the reasons given by

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* Reported in full, I L R., 18 AH, 253.

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the High Court for reversing it were insufficient. The appellant was a descendant in a family in which there were two branches; the succession in the senior line of Raja Narain Singh the head of the family, who in 1838 mortgaged part of the ancestral estate, and the other branch to which the plaintiff belonged. The father of the latter was of illegitimate birth. There was evidence that the members of the family in the plaintiff's branch had for three generations received malikana allowance; and the Court of first instance had found this as a fact. It was a just inference, and it was now submitted, that a substantial portion of the ancestral estate had been applied by way of maintenance for the collateral members of the family. The appellant relying on his being entitled to maintenance in succession to his father, claimed to have an interest in, or charge upon, the mortgaged property within the meaning of section 91 of the Transfer of Property Act 1892, and in virtue of such interest to be entitled to redeem the mortgage of 1838. There was not, it was contended, any break in consequence of the illegitimate birth of the plaintiff's father Bhoj Singh; and against the continuance of the right to maintenance that illegitimacy was no bar.

As averred in the plaint, and found by the first Court, Indarjit Singh, father of Bhoj, and grandfather of the plaintiff, in succession to Sanwant, had received the malikana allowance. Referring to the effect of the illegitimacy of Bhoj, according to the Hindu Law, an illegitimate son was not in any sense "quasi nullius filius," although he did not share, and had no coparcenary right, in joint family estate. Such a son had a recognized, though lower, status in the family of his father, and he had a right to maintenance out of the family estate. The general principle might be thus stated,—that disqualification to share in the family estate on account of illegitimacy did not involve a disqualification to be maintained out of that estate. There was, it was submitted, no reason why the illegitimacy of Bhoj should involve his incapacity to transmit the right to malikana not withheld in this family from the younger branch. The Hindu law was liberal in the matter of assigning maintenance to those who were regarded as members of the family, and the right might attach to a junior line within certain limits. As an authority to show that offspring

not of legitimate birth might be regarded, as belonging to a family, *Pandara Telaver v. Puli Telaver* (1) was cited: there the judgment gave effect to such propositions. In regard to the consequences of illegitimacy as to disqualifying to inherit reference was made to the Mitakshara, Chapter I, section XI paragraphs 30, 31, 33; R. C. Mitra, Tagore Law Lectures 1895, 1896, lecture 11, where the texts were given as to maintenance, and to the judgment at page 369 of I. L. R., 6 Allahabad Series.

Mr. J. D. Mayne and Mr. G. E. A. Ross, for the respondent, argued that the judgment of the High Court was right. By the Hindu Law the right of Bhoj Singh to maintenance was a personal right only attaching to him as the illegitimate son of Indarjit; and no right over the family inheritance could have been claimed by him. This applied to the claim attempted to be made for his son that the latter had an interest in the family estate. That interest had not been founded upon a malikana agreed to be paid, or made the subject of a decree. Resting only on the right of Bhoj Singh to maintenance, the present claim could not be supported, because an illegitimate son could only claim maintenance from his father's estate and could neither claim it from his collateral relations, nor from the estate of the family to which his father belonged. The right of the illegitimate son attaching to him personally was not transmissible from him to his son by inheritance. Reference was made to the Mitakshara, Chapter I, section XI paragraphs 30 and 59; *Chuoturiya Run Murdun Syn v. Sahub Purhulad Syn* (2). *Har Gobind Kuari v. Dharam Singh* (3) was also referred to show the personal nature of the right to maintenance.

Sir W. H. Rattigan, Q. C. replied.

The judgment of the Board was as follows:—

The defendant in the original suit, now respondent, is in possession of the Husain Taluk by virtue of a mortgage effected in the year 1833 by the Talukdar Narain Singh. The plaintiff seeks to redeem the property. The Subordinate Judge decreed redemption on payment of Rs. 51,000 and interest to date of

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(1) (1863) 1 Mad, II C R, p. 478, 482.

(2) (1857) 7 Moo., I. A., 18.

(3) (1861) I. L. R., G. ALI, 329.

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payment. The High Court reversed that decree and dismissed the suit.

The plaintiff is the son of Bhoj Singh who was son of Indarjit and first cousin once removed of Narain, the common ancestor of the two being Mittar Singh the grandfather of Narain and the great-grandfather of Bhoj. The plaintiff first claimed title as a co-sharer in the estate; but he failed in that claim because his father Bhoj was not the legitimate son of Indarjit. The plaintiff still claims to redeem on the ground that he is entitled to maintenance out of the estate; which, as he contends, is a charge or interest carrying with it the right to redeem within the terms of the Transfer of Property Act 1882. This position he seeks to establish in two ways. First, he alleges a title by contract with the widows and heirs of Narain. Secondly, he contends that Bhoj, though excluded from inheritance, was entitled to maintenance from the estate, and that Bhoj's title has descended to himself.

The contract with the widows is contained in a declaration by them dated 20th August 1850. It appears that Bhoj had sued to recover the whole estate from them, that his suit had been dismissed by the Sudder Ameen, and that he had appealed to the Sudder Dewani Adawlut. The operative part of the declaration is as follows :—

“ Now through fear of ruining the ancestral estate he came on the right path, and of his own free will and accord came to us and so we are also pleased with him. We therefore declare in writing that we shall continue to pay Rs. 457 from the malikana dues to the said Kuar without objection after taking possession of the said villages under the settlement proceeding, as the same was paid for maintenance to the forefathers of the said Kuar by the Raja, masnad-nashin of this family.”

Four days later Bhoj executed a deed of relinquishment in which he withdrew his appeal and stated :—“ In fact the appellant has no right except to the malikana dues of village Allahdinpur which was formerly granted to his grandfather Sanwant Singh by Raja Narain Singh.”

From these documents the Subordinate Judge deduces the conclusion that the widows of Narain, in whom a widow's estate

was then vested, granted, or agreed to continue, a malikana allowance, which was charged on the estate in favour of Bhoj and on his death descended to the Plaintiff. But there is no such agreement. What virtue there might be in the word 'malikana,' or in the thing signified, we need not discuss; for the widows do not profess to vest or to recognise any malikana right in Bhoj. There is nothing in the record to show any malikana right in anybody but the widows except the indirect assertion of Bhoj himself that malikana dues over one of the 43 villages for which he was suing had been granted to his grandfather. The malikana dues of the estate belonged to the widows subject to the mortgage by Narain. They were not in possession. All they undertake is that when they get possession they will out of the malikana dues so recovered pay Rs. 457 a year to Bhoj, as the same was paid to his forefathers. In point of fact the agreement has been wholly ineffectual, because the widows, who have now been dead for many years, never got possession at all. But if they had, they only agreed to make a money payment to Bhoj personally, and they did nothing to create a heritable interest in him or any charge on the inheritance.

The more general question of law raised by the plaintiff relates to the position of the offspring of an illegitimate son. The family belongs to one of the twice-born classes. Among them an illegitimate son takes no part of the inheritance; but he is entitled to maintenance from the estate of his father. This law is found in sections 11 and 12 of Chap. I. of the Mitakshara. In par. 3 of section 12 it is thus stated:—"It follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share . . . but if he be docile he receives a simple maintenance." There is no reason to think that this effect of illegitimacy differed according to the particular mode of it; and the more general statement applying to illegitimacy generally which their Lordships have just made is embodied in the judgment of this Board in *Chuoturya Run Murdun Syn v. Sahub Purbulad Syn* (1).

The Subordinate Judge, whose opinion has been supported at this Bar in an able argument by Sir Wm. Rattigan, reasons thus.

(1) (1857) 7 Moo, I A, at pp 50 and 53.

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He states the rule that illegitimate sons of a Hindu are entitled to maintenance out of their father's estate. He then continues:—
 “Bhoj Singh was entitled to maintenance out of the estate held
 “by Narain Singh, not because of his relationship with Narain
 “Singh, but because he was a son of Indarjit Singh, who in his
 “turn had a share in the estate. I have therefore no doubt that
 “as the estate was joint family property of the descendants of
 “Mittar Singh, among whom Bhoj Singh was one, the latter as
 “such member, though of illegitimate descent, was entitled to be
 “maintained out of the estate.”

It seems to their Lordships that this reasoning leaves the difficulty of the plaintiff's case wholly untouched. Conceding that Bhoj could claim maintenance as against Narain, the question is whether he could transmit that claim to his son. Indarjit, we are told, had a share in the family estate. Bhoj then had a right to maintenance out of Indarjit's estate including that share. But Bhoj had no share in the family estate out of which the plaintiff could be maintained; therefore the plaintiff's right to be maintained out of his father's estate does not place him in the same relation to the family estate as Bhoj derived from his right in respect of Indarjit's estate.

On this point the High Court, speaking of Bhoj's right, say:—“No authority has been shown to us for holding that this is anything but a personal right.” Neither has any been shown to their Lordships. Sir Wm. Rattigan cited a case from Madras High Court Reports Vol. I. p. 478, *Pandaiya Telaver and another v. Puti Telaver and others*, which, he contended, was a direct authority in his favour. But the question there was whether an illegitimate daughter entitled to maintenance out of her father's estate was so far a member of his family as to make a marriage with her a lawful marriage; and the Court held that she was. Whether right or wrong, that decision has no bearing on the question whether a right to be maintained, vested in one who cannot inherit, is itself a heritable right. The plaintiff's proposition does not appear to follow from the expression in the Mitakshara which says that the illegitimate son “if he be docile,” receives a “simple maintenance.” On the contrary that passage is more consistent with a purely personal right; and

there is no authority either of texts or of decisions to contravene the obvious meaning.

The plaintiff would also, before he could succeed, have to show that a claim for maintenance, not founded on contract or decree, is an interest in or charge upon the property within the meaning of the Transfer of Property Act. The High Court think it is not. The point has been much discussed at the Bar, but no authority has been produced either way. As the principle on which their Lordships have expressed their concurrence with the High Court goes to the root of the plaintiff's title to maintain this suit, it is not necessary for them to decide the second point. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitors for the appellant.—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent:—Messrs. *Pyke and Parrott.*

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He states the rule that illegitimate sons of a Hindu are entitled to maintenance out of their father's estate. He then continues:—
 "Bhoj Singh was entitled to maintenance out of the estate held
 "by Narain Singh, not because of his relationship with Narain
 "Singh, but because he was a son of Indarjit Singh, who in his
 "turn had a share in the estate. I have therefore no doubt that
 "as the estate was joint family property of the descendants of
 "Mittar Singh, among whom Bhoj Singh was one, the latter as
 "such member, though of illegitimate descent, was entitled to be
 "maintained out of the estate."

It seems to their Lordships that this reasoning leaves the difficulty of the plaintiff's case wholly untouched. Conceding that Bhoj could claim maintenance as against Narain, the question is whether he could transmit that claim to his son. Indarjit, we are told, had a share in the family estate. Bhoj then had a right to maintenance out of Indarjit's estate including that share. But Bhoj had no share in the family estate out of which the plaintiff could be maintained; therefore the plaintiff's right to be maintained out of his father's estate does not place him in the same relation to the family estate as Bhoj derived from his right in respect of Indarjit's estate.

On this point the High Court, speaking of Bhoj's right, say:—"No authority has been shown to us for holding that this is anything but a personal right." Neither has any been shown to their Lordships. Sir Wm. Rattigan cited a case from Madras High Court Reports Vol. I. p. 478, *Pandaiya Telaver and another v. Puli Telaver and others*, which, he contended, was a direct authority in his favour. But the question there was whether an illegitimate daughter entitled to maintenance out of her father's estate was so far a member of his family as to make a marriage with her a lawful marriage; and the Court held that she was. Whether right or wrong, that decision has no bearing on the question whether a right to be maintained, vested in one who cannot inherit, is itself a heritable right. The plaintiff's proposition does not appear to follow from the expression in the Mitakshara which says that the illegitimate son "if he be docile," receives a "simple maintenance." On the contrary that passage is more consistent with a purely personal right; and

there is no authority either of texts or of decisions to contravene the obvious meaning.

The plaintiff would also, before he could succeed, have to show that a claim for maintenance, not founded on contract or decree, is an interest in or charge upon the property within the meaning of the Transfer of Property Act. The High Court think it is not. The point has been much discussed at the Bar, but no authority has been produced either way. As the principle on which their Lordships have expressed their concurrence with the High Court goes to the root of the plaintiff's title to maintain this suit, it is not necessary for them to decide the second point. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitors for the appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent:—Messrs. *Pyke and Parrott.*

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FULL BENCH.

1899
December 19.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Blair and Mr. Justice Burkill.

LAMIR HASAN AND ANOTHER (DECREE-HOLDERS) v. SUNDAR AND ANOTHER (JUDGMENT-DEBTORS).*

Execution of decree—Limitation.—Act No. XV of 1877 (Indian Limitation Act), Sections 7 and 8—Minority.

Section 8 of the Indian Limitation Act, 1877, applies only to those cases in which the act of the adult joint creditor is *per se* a valid discharge. *Seshan v. Rajagopala* (1) and *Govindram v. Talva* (2) followed. *Hargobind v. Srikishen* (3) overruled.

A decree was passed in 1881 in favour of two decree-holders. Subsequently one of the decree-holders died, and the names of his widow and his two minor sons and one minor daughter were entered as his representatives. In 1888 an application was made for execution by the widow on behalf of the minor sons, which was dismissed. In February 1894 the two sons of the deceased decree-holder being still minors made another application for execution through one Aijaz Husain. *Held* that section 7 of the Limitation Act applied, and that this application was not time-barred. *Lalit Mohun Misser v. Janokya Nath Ray* (4) and *Pahari v. Bhupendra Narain Roy* (5) followed.

* Second Appeal No. 312 of 1897 from an order of C. Rustomjee, Esq. District Judge of Moradabad, dated the 30th January 1897 reversing the order of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 28th July 1894.

(1) (1889) I. L. R., 13 Mad., 236. (3) Weekly Notes, 1884, p. 58.

(2) (1895) I. L. R., 20 Bom., 383. (4) (1893) I. L. R., 20 Calc., 714.

(5) (1895) I. R., 23 Calc., 374.

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This was an appeal from an order passed in execution of a decree. The original decree was passed on the 12th December, 1881. There were two decree-holders, Musammât Khatun Daulat and Amir Hasan. The latter died, and his widow Musammât Bukkaya and his two sons and one daughter, all three minors, had their names entered in lieu of Amir Hasan's. An application for execution was filed by Musammât Bukkaya on behalf of the minors on the 31st August, 1888, but that application was dismissed on the 25th September, 1888. The next application for execution was filed on the 16th of February, 1894, by one Aijaz Husain on behalf of the two sons of Amir Hasan who at that time were still minors. The judgment-debtors objected, but the Court of first instance (Subordinate Judge of Moradabad) disallowed their objections. On appeal to the District Judge that Court allowed the judgment-debtors' objections, holding that execution of the decree was barred by limitation. The applicants appealed to the High Court. The appeal was laid before a Full Bench in pursuance of a recommendation made by Blair and Burkill, JJ., in view of the existence of various conflicting rulings on the point in issue, by their order of the 14th November 1898.

Plaintiff Dabbe Ram Dass (with *Pandit Sundar Lal*) for the appellants.

The issue is a joint one in favor of both the decree-holders. An application, if made by one of them or his representatives, will take effect in favor of both the decree-holders [Article 179 of S. A. No. VII of 1879, Explanation 1]. Applications for execution of the decree were, from time to time, made within the period of limitation prescribed by law by one of the decree-holders or by the legal representatives of the other decree-holder, who were of age at the time. The last of such applications was made by them on the 9th November 1888. This application kept the decree alive up to that date in favor of all the decree-holders. For this proposition, I rely upon *Shib Chunder Das v. Ram Chunder Poddar* (1); *Doye Moyee Dabee v. Nilmoney Chuckerbutty* (2); *Ponnampilath v. Ponnampilath* (3); *Nanda Bai v. Raghunandan Singh* (4) and *Wasi Imam v. Poonil Singh* (5).

(1) (1871) 16 W. R., 29.

(3) (1880) I. L. R., 3 Mad., 79.

(2) (1876) 25 W. R., 70.

(4) (1885) I. L. R., 7 All., 282.

(5) (1893) I. L. R., 20 Cal., 694.

Although the present application for execution of the decree was made over five years after the 9th November 1888, but as the appellants were minors at the time from which the period of limitation was to be reckoned, that is on the 9th November 1888, and are still minors, they can avail themselves of the provisions of section 7 of the Indian Limitation Act, 1877. There can be no doubt, that the appellants are persons "entitled to make an application" for execution of this decree within the meaning of that section [—see section 231 of the Code of Civil Procedure, 1882]. Article 179 of the second schedule to the Indian Limitation Act provides several points of time from which the period of three years shall begin to run. I contend that for purposes of the Limitation Act, 1877, the period which begins from each point is a separate period, and if a person entitled is under a disability at the time when any one of such periods commences, the operation of the Act is suspended during the continuance of the disability by virtue of section 7 of the Act. In support of my contention I rely upon *Har Gobind v. Srihissen* (1); *Lachman Prasad v. Bhagwan Singh* (2); *Lalit Mohun Misser v. Janakty Nath Roy* (3) and *Norindra Nath Pahari v. Bhupendro Narain Roy* (4).

The judgment of this Court in *Har Gobind v. Srihissen* (1) was reversed upon review, and relying upon section 8 of the Indian Limitation Act, 1877, it was set aside by this Court. But section 8 of the Limitation Act applies to cases prior to the institution of a suit. The words in the section are "joint creditors or claimants." It does not apply to "decree-holders." Further, that section is applicable to cases where payment to one of the joint creditors or claimants *per se* discharges the debtor. In case of payment to one of the joint decree-holders it is not the act of the joint decree-holder, but the act of the Court executing the decree, that is intended to operate as a valid discharge. Though a joint decree-holder may accept payment out of Court and grant a receipt in acknowledgment of such payment, yet in the absence of a certificate of satisfaction, the creditor's acknowledgment does not of itself operate as a discharge

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(1) Weekly Notes, 1883, p. 63; 1884, p. 58. (3) (1893) L. L. R., 20 Cal., 714.

(2) Weekly Notes, 1885, p. 43.

(4) (1895) L. L. R., 23 Cal., 374.

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[see sections 231, 257 and 258 of the Code of Civil Procedure, 1882]. This was the view of the law taken by the Bombay High Court in *Govind Ram v. Tutia* (1) and by the Madras High Court in *Sheshan v. Raja Gopala* (2).

Munshi *Gokul Prasad* (with whom Pandit *Tej Bahadur Sapru*) for the respondents.

If the other decree-holders could take out execution and give a valid discharge, then the decree is certainly barred against the present appellants, *vide* section 8 of Act XV of 1897, which provides only for cases where *all* the decree-holders rest under disability, which is not the case here. The decree in this case having been passed jointly in favour of more persons than one, any one could take out execution and give a valid discharge. The decree was based apparently upon a contract, and a contract can be discharged by any one of the joint promisees without the consent of the others. *Hargobind v. Srikishen* (3), *Ramautar v. Ajudhia Singh* (4), *The Collector of Shahjahanpur v. Surjan Singh* (5), *Surju Prasad Singh v. Khwakhish Ali* (6), *Banarsi Das v. Maharani Kuar* (7), and Act No. XV of 1877, Sch. II, Art. 179, Expl. (1). But the Madras case goes still further. It lays down that to a case like the present neither section 7 nor section 8 would apply. Section 8 of Act XV of 1877 would not apply, inasmuch as it does not contemplate the case of execution-creditors at all, and secondly because in view of section 258, Act XIV of 1882, it is the act of the Court that is intended to operate as a valid discharge. Section 7 does not apply, inasmuch as what is necessary under that section is that either there ought to be one single decree-holder who is a minor, or there ought to be more who are all of them minors, for, otherwise a decree may be barred against the major decree-holders and yet under section 231, Civil Procedure Code, a minor decree-holder may seek execution of the entire decree, thus indirectly benefiting the other decree-holders against whom the decree may have become barred. *Seshan v. Rajagopala* (8). See also *Mitra on Limitation* and *Vigneswarar*

(1) (1895) I. L. R., 20 Bom., 383.

(2) (1889) I. L. R., 13 Mad., 236.

(3) Weekly Notes, 1884, p. 58.

(4) (1876) I. L. R., 1 All., 231.

(5) (1881) I. L. R., 4 All., 72.

(6)* (1882) I. L. R., 4 All., 512.

(7) (1882) I. L. R., 5 All., 27.

(8) (1889) I. L. R., 13 Mad., 226.

v. *Bapayya* (1). So in this case section 8 does not apply any more than section 7. The case of *Govindram v. Tutia* (2), decides that section 8 of Act XV of 1877 does not apply to execution-creditors, but it differs from the Madras case in so far as it holds that section 7 does apply where one of several decree-holders is a minor. As to *Narendra Nath Pahari v. Bhupendra Narain Roy* (3), *Lalit Mohun Misser v. Janoky Nath Roy* (4) and *Mon Mohun Buxsee v. Gunga Soondery Dabee* (5) it is submitted that these were cases in which there was only one decree-holder and he was a minor, so that these cases are quite distinguishable from the present.

STRACHEY, C. J.—The lower appellate Court has reversed the decision of the Court of first instance and held the application of these minors barred by limitation on the authority of *Hargobind v. Srikishen* (6). That decision applied the provisions of section 8 of the Limitation Act to a case of joint decree-holders. The application of section 8 to such a case has since been more fully considered by the Madras High Court in *Seshan v. Rajagopala* (7), and by the Bombay High Court in *Gobindram v. Tutia* (2). These Courts have held that section 8 of the Limitation Act applies only to those cases in which the act of the adult joint creditor is *per se* a valid discharge. The Madras High Court in the earlier case pointed out that the question whether one of several decree-holders can enter satisfaction on behalf of all is one of procedure, and a rule of decision must be looked for in the Code of Civil Procedure. They added:—"Having regard to sections 258 and 231, we are of opinion that it is not the act of the joint decree-holders, but the act of the Court executing the decree, that is intended to operate as a valid discharge." I agree with the views expressed in the Madras and Bombay cases, and I think that the decision in *Hargobind v. Srikishen* is based on a wrong view of section 8 and ought to be overruled.

The other questions which have been discussed on this appeal relate to the construction to be placed on section 7 of the Limitation Act. The applicants for execution in this case are still

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(1) (1892) I. L. R., 16 Mad., 436.

(2) (1895) I. L. R., 20 Bom., 383.

(3) (1895) I. L. R., 23 Calc., 374.

(4) (1893) I. L. R., 20 Calc., 714.

(5) (1882) I. L. R., 9 Calc., 181.

(6) Weekly Notes, 1884, p. 59.

(7) (1889) I. L. R., 13 Mad., 236.

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minors. In 1888 an application was made for execution by their mother, the widow of one of the decree-holders. That application was within time under art. 179 of sch. ii of the Act. By reason of the first explanation to art. 179, that application being made by a representative of one of the joint decree-holders, took effect in favour of all. Under the fourth head of the third column of art. 179, that application became a fresh point for reckoning the period of limitation. At the time when that application was made these present applicants were minors. Their application now in question was not made till February, 1894. The question is, whether they are entitled to the benefit of section 7. There are still other persons jointly interested with them in the decree who are adults and who could not apply on their own behalf by reason of limitation. It has been contended on the authority of *Seshan v. Rajagopala* that section 7 would not apply where some only, and not all, of the judgment-creditors are affected by a legal disability. On this point I agree with the Bombay High Court in *Gobindram v. Tatia* that no such restriction can properly be placed on section 7. Apart from that I think that the present application is protected by the terms of the section. Two cases decided by the Calcutta High Court and precisely in point have been cited to us. The first of these is *Lolit Mohun Misser v. Janoky Nath Roy* (1); and the second is *Norendro Nath Pahari v. Bhupendra Narain Roy* (2), I see no reason to dissent from those decisions. The result is that this appeal must be allowed and the decision of the first Court be restored, and the execution will proceed. The appellant will have his costs, including fees on the higher scale.

BLAIR, J.—I entirely concur in the order proposed and for the reasons given by the learned Chief Justice.

BURKITT, J.—I am of the same opinion, and for the same reasons.

Appeal decreed.

(1) (1893) I. L. R., 20 Calc., 714.

(2) (1895) I. L. R., 23 Calc., 374.

Before Mr. Justice Knox, Mr. Justice Bannerji and Mr. Justice Aikman.

MURLIDHAR AND OTHERS (DEFENDANTS) v. PEM RAJ AND OTHERS

(PLAINTIFFS.)*

1899
December 20.

Act No. XII of 1881 (N.-W. P. Rent Act), Section 7—Expropriatory tenant—Expropriatory rights arising on sale of part only of vendor's proprietary rights.

It is held in order that the provisions of section 7 of the North-Western Provinces Rent Act, 1881, may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. Bhawan Prasad v. Ghulam Muhammad (1) approved.

It is also held that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory possession of the sir land, and agrees to relinquish his expropriatory rights in respect of the sir land the vendor, in the event of such possession not being divided or expropriatory rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. Bhawan Prasad v. Ghulam Muhammad (2) approved.

The facts of this case are as follows:—Murlidhar and others, being owners of a ten biswa share in the zamindari of a village called Gunaupur, sold to Pem Raj and others, on the 22nd September 1894, four biswas out of the said share. By the same transaction the vendors also purported to convey to the vendees 58 bighas 13 biswas of sir land. The sir land thus dealt with by the conveyance was a portion of 226 bighas 14 biswas of sir land appertaining to the whole village, and was slightly in excess of what would have been the sir of the vendors proportionate to the four biswa share sold by them. The sale-deed provided that the purchasers should be put into actual possession of the sir land, and that the vendors should relinquish such expropriatory rights as they might acquire therein. It was also stated in the sale-deed that out of Rs. 4,500, the amount of consideration for the sale, Rs. 1,500 should be deemed to be the consideration for the transfer of the sir land and for the agreement to relinquish the expropriatory rights. The sale-deed further provided that in the event of the vendees failing to deliver possession of the sir land to the purchasers, or of their not relinquishing their expropriatory rights, the vendees would be entitled to a refund of

* Second Appeal No. 555 of 1896 from a decree of Rai Pyare Lal, District Judge of Mainpuri, dated the 5th August 1896, confirming a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 15th June 1895.

(1) (1895) I. L. R., 18 All., 121.

(2) (1896) I. L. R., 19 All., 35.

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the aforesaid sum of Rs. 1,500. Possession not having been delivered over the sir land, the present suit was brought for recovery of possession, and in the alternative for a refund of Rs. 1,500 with interest. The Court of first instance (Subordinate Judge of Mainpuri) made a decree in favour of the plaintiffs for the refund of the amount stated above. On appeal the lower appellate Court (Officiating District Judge of Mainpuri) affirmed the decree of the first Court. The defendants appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

The object of that part of the contract between the parties which related to the sir land was to compel the defendants not to exercise the right conferred on them by section 7 of Act No. XII of 1881, and thus to defeat the object with which the provisions of that section were enacted. The contract is therefore void under section 23 of Act No. IX of 1872, and is not enforceable at law—Leake on contracts, page 677, *Kashi Prasad v. Kedar Nath Sahu* (1), *Bhikham Singh v. Har Prasad* (2) and the judgment of this Court in an unreported case (Second Appeal No. 890 of 1896, decided on the 5th May 1899).

The losing or parting with the proprietary rights of a person in a mahal so as to create exproprietary rights need not be a loss of or parting with his entire rights in the mahal. If it were not so, a man might sell all his rights in a mahal save and except one square inch of land therein. This would then prevent the acquisition of the rights of an exproprietary tenancy, which section 7 of Act No. XII of 1881 intended to confer, and the retention of which in the hands of the expropriator is so carefully provided for in section 9 of the Act—*Gulab Rai v. Indar Singh* (3). The object of these sections is to make some provision for improvident proprietors who are compelled by circumstances to sell or part with their lands. A proprietor may sell any part of his rights in a mahal or in the sir lands in the mahal—*Sital Prasad v. Amtul Bibi* (4), *Payag Singh v. Nurul Hasan Khan* (5),

(1) (1897) I. L. R., 20 All., 219.

(2) (1896) I. L. R., 19 All., 35.

(5) (1889) Weekly Notes, 1890, p. 5.

(3) (1883) I. L. R., 6 All., 54.

(4) (1885) I. L. R., 7 All., 683.

Ghansham Das v. Sheomungal Singh (1). In such a case exproprietary rights accrue to the vendor—*Bhawani Prasad v. Ghulam Muhammad* (2). The Board of Revenue in these Provinces was at first inclined to take this view—*Shauikh Seraj-ud-din v. Rohsin Ali* (3)—it has, however now expressed a different view—*Khashaba v. Baba* (4). The adoption of this interpretation would altogether defeat the object with which section 7 of Act No. XII of 1881 was enacted, and would be inconsistent with the policy which underlies the enactment of section 174A of this Act or sections 50, 125, and 190 of Act No. XIX of 1873. A construction which defeats the object of the law should not be adopted. In the present case the contract being void, the suit is not maintainable.

Munshi *Kabirji Prasad* (with Munshi *Gokul Prasad*) for the respondents.

The interpretation put upon section 7 of the Rent Act No. XII of 1881, in *Bhawani Prasad v. Ghulam Muhammad* (2), deserves reconsideration. A person must part with all his proprietary rights in a mahal before he can acquire exproprietary rights in the land held by him as sir. I rely upon the wording of the section itself. The word 'his' in the first paragraph of the section is very expressive. In the absence of any limitation the word 'his proprietary rights' ought to be construed in their largest sense—*Jorao Bai v. Kalyaji Ali Khan* (5). In that case it was observed that "section 7 of Act No. XII of 1881 must refer to a case where the zamindar loses or parts with *all* his proprietary rights." Further on in the same case it was observed that "the words 'his proprietary rights' as used in section 7 must refer to the losing or parting with all his proprietary rights." Section 7 of the Rent Act is intended to provide a protection against absolute ruin for a zamindar who has lost all that he had and has nothing left to subsist on. But if the view taken in *Bhawani Prasad v. Ghulam Muhammad* (2) be correct, it might happen that a person while retaining the greatest part of his property for himself might part with the

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(1) Weekly Notes, 1891, p. 159.*

(2) (1895) L. L. R., 18 All., 121.

(3) Weekly Notes, 1898, p. 177.

(4) (1879) L. L. R., R. and R., 111.

(5) (1888) Sel. Dec., L. of R., p. 8.

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minutest fraction of it with this result, that he would acquire exproprietary rights in the proportionate share of his sir land. Is he indigent enough to entitle him to the grace allowed by law? What would be the value of such grace? I submit that the interpretation put upon section 7 by the Board of Revenue in *Khushali v. Bhuika* (1) is correct and based upon sound reasoning.

BANERJI, J.—The appellants, who were defendants in the Court of first instance, held a ten-biswas share in the zamindari of the village Gumanpur. They sold four biswas out of the said 10 biswas to the plaintiffs on the 22nd September 1893. By that sale-deed the defendants purported to convey to the plaintiffs not only a 4-biswas share of the zamindari, but also 58 bighas 13 biswas of sir land. This quantity of sir land is a portion of 226 bighas 14 biswas of sir land appertaining to the whole village, and is slightly in excess of what would be the sir of the defendants proportionately to the 4-biswas share sold by them. The sale-deed provided that the purchasers should be put into actual possession of the sir land, and the vendors should relinquish such exproprietary rights as they might acquire therein. It was also stated in the sale-deed that out of Rs. 4,000, the amount of consideration for the sale, Rs. 1,500 should be deemed to be the consideration for the transfer of the sir land and the agreement to relinquish exproprietary rights. The sale-deed further provided that in the event of the vendors failing to deliver possession of the sir land to the purchasers, or of their not relinquishing their exproprietary rights, the vendees would be entitled to a refund of the aforesaid sum of Rs. 1,500. Possession not having been delivered over the sir land, the present suit was brought for recovery of possession, and, in the alternative, for a refund of Rs. 1,500 with interest. The Court of first instance made a decree in favour of the plaintiffs for the refund of the amount stated above. That decision has been affirmed by the lower appellate Court. The defendants have preferred this appeal on the ground that the agreement upon which the plaintiffs have based their claim is contrary to law and is therefore void. It was held in *Bhikham Singh v. Har Prasad* (2) that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory

(1) (1888) Sol. Dec., B. of R., p. 8. (2) (1895) 1 L. R., 18 All., 121.

possession of the sir land and agrees to relinquish his proprietary rights in respect of the sir land, the vendee, in the event of such possession not being delivered or expropriatory rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. To this view I still adhere. The only other question which has to be considered in this case, therefore, is whether, by selling a part of their proprietary rights in the village in question, the defendants could acquire expropriatory rights in respect of their sir land under section 7 of Act No. XII of 1881. The decision of that question depends upon the construction to be placed on the provisions of section 7. Does that section contemplate that expropriatory rights would accrue in favour of a person losing or parting with his proprietary rights only when he loses or parts with all his proprietary rights or that he would acquire such rights even when he parts with or loses a portion of his proprietary rights? This question was answered by a Division Bench of this Court in the case of *Bhawani Prasad v. Ghulam Muhammad* (1). In that case it was held that in order that the provisions of section 7 may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. With that decision I am fully in accord. The language of section 7 is no doubt not so clear as it should have been; but having regard to the policy of that section any construction other than that placed on it in the ruling referred to above would evidently defeat the object of the section and enable a proprietor to divest himself of his sir lands by excluding from sale an infinitesimal portion of his proprietary rights. The reasons for holding that the section does not contemplate the transfer or loss of all proprietary rights are fully stated in that judgment, and I have nothing to add to those reasons. There is, it is true, a ruling of the Board of Revenue, reported in the *Selected Decisions of the Board of Revenue for 1888-1891*, at page 8, in which a contrary view was held, but I am unable to follow the conclusions arrived at in that ruling. According to well-known rules of construction it is our duty to place on the section such a construction as would effectuate the intention of the Legislature.

1899

MURIDHAR

"
 PEM RAJ

(1) (1896) I. L. R., 19 All., 35.

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provided that the language of the section can admit of the construction. I hold that the language of section 7 is sufficiently wide to justify us in construing it in the manner in which it was construed in *Bhawani Prasad v. Ghulam Muhammad* (1). If the words "proprietary rights" in section 7 may, as I hold they do, include a part of the proprietary rights, the subsequent words "land held by him as sir" can be equally held to include a proportionate part of the sir land. In this view as the agreement upon which the plaintiffs have based their claim would have the effect of defeating the law as I understand it, it is a void agreement and cannot be given effect to. The plaintiffs' suit should therefore have been dismissed. I would allow the appeal, set aside the decrees of the Courts below and dismiss the suit; but having regard to the conduct of the defendants and to the fact that the plea which has been taken in this Court was never raised in the Court below, I would make no order as to the costs of the litigation.

KNOX, J.—I follow my learned brother, but with extreme hesitation. If the question was *res integra* and if the precedent, *Bhawani Prasad v. Ghulam Muhammad* (1), did not stand as a reported decision of this Court, I should have been very much inclined to hold otherwise. The interpretation now placed seems to me to put such a strain upon the words of the section as they stand that I doubt whether they can bear it. We have had abundant evidence that the language of this particular Act is in many cases, to say the least of it, very inartistic, and it may be that the interpretation which we now put is one within the spirit and policy aimed at by the Legislature when they enacted this section.

AIKMAN, J.—The decision of this appeal turns upon the construction of the opening words of section 7 of Act No. XII of 1881. These words are as follows:—"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting" at a rate of rent such as is specified in the section. The Board of Revenue for these provinces held that the right thus created did not arise until the person claiming it lost or parted with the whole of his proprietary rights

(1) (1395) I. L. R., 18 All., 121.

in the mahal. In the case of *Bhawani Prasad v. Ghulam Muhammad* (2) a division Bench of this Court pointed out that if this was the meaning to be attributed to the words of the section, the object of the Legislature would be easily defeated. This is undoubtedly true. I think it is possible to construe the words "his proprietary rights" as meaning the whole or part of his proprietary rights; but there remains the passage in the section "shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting." The learned Judges who decided the case just referred to do not consider what meaning would have to be put on those words if an expropriary right arises when a zamindar parts with a portion only of his proprietary rights. I scarcely think that the learned Judges would have held that if a zamindar parted with a mere portion of his proprietary rights he would thereby at once become an expropriary tenant of the whole of the sir land which he had held in the mahal, and yet that is the apparent meaning of the words used by the Legislature. To carry out the view of the Division Bench to its logical conclusion, we should have to read the section as if it ran "shall have a right of occupancy in such portion of the land held by him as sir in such mahal as is proportionate to the proprietary interests he has lost or parted with." This seems to me to trench dangerously on legislation. But in view of the consideration that the construction put upon the section by the Board of Revenue would result—to use the words of the learned Judges who decided the case of *Bhawani Prasad v. Ghulam Muhammad* (1) in opening a door through which it would be possible for evasions of the law to become general in these provinces, I do not wish to depart from the principle *stare decisis*, and I concur in the order proposed.

By THE COURT.—The order of the Court is that the appeal is allowed, the judgment and decree of the lower appellate Court are set aside, and the suit of the plaintiffs is dismissed, but without costs.

* *Appeal decreed.*

(1) (1895) I. L. R., 18 All., 121.

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MUELLIDHAR
v.
PEM RAJ.

APPELLATE CIVIL.

1900
January 4.

Before Mr. Justice Blair and Mr. Justice Burkitt.

MEHRBANO (DEFENDANT) v. NADIR ALI AND ANOTHER (PLAINTIFFS) *
*Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—
Prior and subsequent mortgagees—Effect of non-compliance with
section 85*

A prior mortgagee, without making a puisne mortgagee a party to his suit, sued on his mortgage, obtained a decree for sale, sold the mortgaged property, and purchased it himself. Subsequently the puisne mortgagee holding a mortgage over the same property brought his mortgage into suit without making the prior mortgagee a party, and obtained a decree for sale. *Held* that the puisne mortgagee could not bring the mortgaged property to sale in execution of such decree. *Janki Prasad v. Kishen Das* (1), followed.

THE facts of this case are as follows:—

Dilawar Ali owned 6½ biswas of the village in suit. This share he hypothecated to Banwari Das by means of four deeds executed on different dates in the years 1871, 1875 and 1876. After the execution of at least two of these deeds Dilawar Ali mortgaged the same property to Narain Das. Banwari Das sued on his deeds before Act No. IV of 1882 came into force, and obtained a decree. He did not make Narain Das, the subsequent incumbrancer, a party to that suit. Narain Das sued in 1886, and obtained a decree. He did not make Banwari Das a party to his suit. Banwari Das, in execution of his decree, brought the mortgaged property to sale and purchased it himself. Narain Das sold his decree, but when the purchaser attempted to execute it by sale of the property, objection was taken by the representatives of Banwari Das, the first mortgagee.

The suit, out of which the present appeal arose, was brought by the representatives of Banwari Das for a declaration that the decree held by the defendant as purchaser from Narain Das could not be executed as against them. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit. On appeal the lower appellate Court (Additional Judge of Moradabad) reversed the decree of the Subordinate Judge and gave the

* Second Appeal No. 605 of 1897, from a decree of H. W. Lyle, Esq., Additional District Judge of Moradabad, dated the 25th May 1897, reversing a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 2nd September 1896.

(1) (1894) I. L. R., 16 All., 478.

plaintiffs the declaration which they sought. The defendant thereupon appealed to the High Court.

Mr. *S. Amiruddin* for the appellant.

The Hon'ble Mr. *Conlon* and Maulvi *Ghulam Mujtaba* for the respondents.

BLAIR and BURKITT, JJ.—In this case the contending parties are practically the first and second mortgagees or their representatives. The first mortgagee, who is represented by the plaintiffs-respondents, sued upon his mortgages, obtained decrees for sale, and in execution purchased the mortgaged property. To his suit he did not make the puisne mortgagee a party, as he was bound to do under the provisions of section 85 of the Transfer of Property Act. The puisne mortgagee, who is represented by the defendant-appellant, in his turn instituted a suit upon his mortgage: he did not make the latter a party to his suit. The puisne mortgagee obtained a decree for sale, and has now put up and advertised the mortgaged property for sale. Thereupon the plaintiffs, the representatives of the prior incumbrancer, have instituted this suit, in which they ask for a declaration that that property is not liable to be sold in execution of the decree held by the defendant puisne mortgagee. A decree has been given by the lower appellate Court in terms of the prayer for relief. The meaning of the decree under appeal we take to be that the defendant the puisne mortgagee cannot bring to sale the mortgaged property in execution of a decree in a suit to which the prior mortgagee was no party. If that is the meaning of the decree it is, in our opinion, a perfectly right decree. For our authority we refer to the case of *Janki Prasad v. Kishen Dat* (1). Broadly stated, the effect of the ruling in that case is that a mortgagee, who has obtained a decree for sale in a suit to which he did not make other mortgagees parties, cannot bring the mortgaged property to sale in execution of that decree. It is immaterial that in the case we have just cited the parties who were prevented from bringing the mortgaged property to sale were the first mortgagees, and that in this case the party sought to be prevented from bringing the mortgaged property to sale is the representative of the second mortgagee. Indeed, the case would

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(1) (1894) I. L. R., 16 All., 478; at pp. 482, 483.

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be, if anything, stronger against the second mortgagee than against the first mortgagee. In our opinion the defendant-appellant here is not entitled to bring this property to sale in execution of the decree for sale which she holds. It may be that in a properly constituted suit with a proper array of parties and in a suit in which she offers to redeem the prior mortgages the appellant may be entitled to bring the property to sale after such redemption. As to that matter, however, it is unnecessary for us to express any opinion. We think that the decree of the Court below as interpreted above is a correct decree. We dismiss this appeal with costs.

Appeal dismissed.

1900
January 10.

Before Mr. Justice Knox and Mr. Justice Blair

BARKAT-UN-NISSA (APPLICANT) v ABDUL AZIZ (OPPOSITE PARTY) *
Civil Procedure Code, section 505—Criminal Procedure Code, section 145
—Order of Magistrate for maintenance of possession no bar to the
appointment of a receiver by a Civil Court

The fact that there exists in respect of any immovable property an order of a Magistrate passed under section 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by section 505 of the Code of Civil Procedure of appointing a receiver in respect of the same property

THE facts of this case sufficiently appear from the order of the Court.

The Hon'ble Mr. Conlan, Mr. W. K. Porter and Maulvi Ghulam Mujtaba, for the appellant.

Mr. S. Amir-ul-din, for the respondent.

KNOX and BLAIR, JJ.—This is an appeal from an order passed by the Subordinate Judge of Moradabad on the 29th July, 1899, refusing to appoint a receiver to certain property, the subject of a suit before him. The ground on which the learned Subordinate Judge bases his refusal is that in suits like this one before him, there is no rule for the appointment of a receiver, and injunctions only are deemed sufficient. He adds that there is no reasonable cause for the appointment of a receiver. Now as to the circumstances of the case. The respondent Maulvi Abdul Aziz is a

* First Appeal No 77 of 1899 from an order of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 29th July 1899.

person who in a prior suit had claimed a declaration from this Court that one Nurul Haq, munsarim of certain waqf property—the property now in suit—had been dismissed from his office of munsarim, that he, Maulvi Abdul Aziz, had been appointed as manager in Nurul Haq's place, and that being so, the mutawalli, Musammat Barkat-un-nissa, had no right to remove him, the said Abdul Aziz, from the managership. The suit brought by Maulvi Abdul Aziz against Musammat Barkat-un-nissa and others was fought up to this Court with the result that the declaration that Maulvi Abdul Aziz asked for was refused and his suit dismissed. This order was passed on the 10th May, 1899. Upon this the appellant before us instituted a suit for the ejectment of Maulvi Abdul Aziz, and after institution applied to the Subordinate Judge for the appointment of a receiver under section 503 of the Code of Civil Procedure. The order refusing the appointment practically gives no reasons for the refusal, and it is not therefore easy to say with authority what it is that weighed upon the Subordinate Judge's mind. The matter has, in another form, been already before this Court, as the appellant asked for an appointment of an *ad interim* receiver pending the hearing of the present appeal. It was then held that the powers of a Civil Court trying an action for ejectment were not in any degree controlled by reason of a Magistrate making an order maintaining possession on behalf of one of the litigants under section 145 of the Code of Criminal Procedure. The reference here made is to an order passed by a Magistrate in 1896, whereby the Magistrate, acting under the provisions of section 145 of the Code of Criminal Procedure, decided that Maulvi Abdul Aziz was in possession and issued an order declaring him to be entitled to possession until "evicted therefrom in due course of law." If this was the fact which weighed with the Subordinate Judge we can only repeat in clear terms what was said on the 18th November, 1899, namely, that the Code of Civil Procedure and the powers of Civil Courts under that Code are in no way fettered by any order that may be passed by a Magistrate under section 145 of the Code of Criminal Procedure. The Magistrate's order under section 145 is only intended to control any period up to the time when the Civil Court takes seisin of the matter and passes such orders as may be

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necessary for the protection of the property. In the present case we consider it absolutely necessary for the preservation and better custody and management of the property that neither of the contending parties should be in possession of it until the dispute between them has been fully determined, and that the property should remain in the custody of a person independent of both parties,—a person moreover whose position will be that of an officer of the Court appointed by and answerable to the Court for all acts done by him during the period of his receivership. We accordingly allow the appeal, set aside the order of the learned Subordinate Judge, and send this case back to him to be dealt with in the light of our instructions and in accordance with the provisions of section 505 of the Code of Civil Procedure. The appellant will get her costs. We think it expedient to add that our order is not to be interpreted as an order setting aside the order of the Magistrate. The appointment of a receiver should be made with the least possible delay, and in order that the Magistrate may be aware of the purview of the order of this Court we direct that a copy be sent to him for his information.

Appeal decreed.

1900,
 January 16.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

ABDULLAH (APPLICANT) v. JITU (OPPOSITE PARTY).*

Criminal Procedure Code, sections 87, 88, 89—Absconding offender—Proclamation and attachment—Sale of attached property—Title of purchaser.

Where property was attached and sold as property of a proclaimed offender under sections 87 and 88 of the Code of Criminal Procedure, it was held that although the proclamation was irregular, yet, the property having vested in third parties strangers to the proceedings in which the proclamation was made, the sale could not be set aside.

THIS was a reference under section 438 of the Code of Criminal Procedure, made by the Sessions Judge of Allahabad. The facts out of which the reference arose are as follows.

A charge was brought in May 1898 against the applicant Abdullah and two other persons. The applicant did not then

*Criminal Revision No. 813 of 1899.

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JITU.

appear, and the case was tried out against the two others, who were fined Re. 1 each under section 426, of the Indian Penal Code. As regards the applicant, the Magistrate who tried the case recorded his opinion that further proceedings need not be taken against him, as the matter was a trivial one. Notwithstanding this the complainant subsequently applied for process against the applicant, which was granted. As the applicant failed to appear, proceedings to enforce his attendance were adopted, and finally his property was attached, and some houses belonging to him were sold. The applicant then appeared, and asked that the proceedings against him might be stopped, and, in another application, that the proceedings for attachment and sale of his property might be set aside. In both applications applicant contended that he was protected by law. In the first application he contended that the Magistrate's remarks in his judgment, dated the 14th June 1898, virtually amounted to an acquittal, and that he could not be tried. On this point the Sessions Judge was of opinion that the order of the Magistrate was not an order of acquittal, and that there was no bar to the applicant's being tried. The Sessions Judge did not in respect of the proclamation proceedings find that any irregularities occurred in the attachment proceedings, except that at the time of attachment the Government did not take possession of the houses, as it should have done under section 88 of the Code of Criminal Procedure, but it left them in applicant's possession, and that even after sale they were apparently still in his possession. He was, however, of opinion that the case was one in which it would be appropriate to stop all proceedings and to cancel the attachments and sales, and to return the sale money to the purchasers. "The charge against him" said the Judge "is a very trivial one and resulted in the case of his two fellow-accused in a fine of one rupee each only. For such an offence it appears to me unnecessary to resort to extreme processes of law which entail attachment and sale of houses, &c., &c., and also to revive the charge after so long." The Government Pleader after taking instructions from the District Magistrate agreed that the matter was not one which ought to be pursued any further. The complainant, however, opposed this course, urging that the applicant was a man of extremely bad antecedents, having several previous convictions against him, and

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JITU.

that in respect of the very matter in question he was at the time bound over to keep the peace and had purposely avoided the process of the Court until such time as his bond should have expired. Under these circumstances the Sessions Judge referred the case to the High Court for orders.

Mr. *R. K. Sorabji* for the applicant.

Maulvi *Muhammad Ishaq* for the opposite party.

BLAIR, J.—Three persons were sent before a Magistrate to answer a charge under section 426 of the Indian Penal Code. Two of them presented themselves, the third was absent. The case was heard against the two who were present. Upon their being convicted, the Court showed its appreciation of the magnitude of their offence by inflicting on each of them a fine of Re. 1. That amount was ordered to be given to the prosecutor, and the Magistrate says that it would more than recoup him for any damage suffered. The Magistrate also says that in his opinion the matter was so trivial that it was not desirable to waste time in pursuing the charge against the absent man. A few days after that determination of the case against the two, a fresh complaint was lodged against the third man by the prosecutor, and the Magistrate rightly held that such a complaint was not barred by any rule of law. The Magistrate entertained the complaint and issued his warrant for the arrest of the person charged. After some search had been made the Magistrate found that the person for whom the warrant had been issued was absconding or concealing himself to evade process, and thereupon on the 12th September drew up a proclamation calling upon the person charged to appear at the Court House at Allahabad within thirty days of the date of proclamation. It is not clear whether there ever was complete publication as required by law of that proclamation. The provisions of sub-sections (b) and (c) appear to have been complied with upon the 17th September. There is nothing to show whether the provisions of sub-section (a) were ever complied with at all. There was no endorsement or statement in writing made by the Court validating the proclamation. It is therefore obviously not a proclamation according to law. It did not specify a place and a time for the appearance of the absent man within thirty days or more from the date of the publication.

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Apparently some form intended to amount to an attachment was gone through, but apparently the property, whatever it was, was allowed to remain in the possession of its original owner. A sale took place of what are described as houses. Purchasers were found and, I suppose, the purchase money was paid. Whether the possession of the property ever passed into other hands than that of the original owner is not clear. Now these matters were brought to the attention of the District Judge in an application for revision made by the absent man, and the Judge refers to this Court a statement of the facts coupled with a recommendation that further proceedings before the Magistrate should be put a stop to, and the attachment and sale be cancelled, and the sale money returned to the purchasers. It has been objected to the Judge's recommendation that the applicant in revision before him had and has his remedy under section 89 of the Code of Criminal Procedure, which enables the subject of such a proclamation as this to prove within two years that he had not absconded to avoid the warrant, and that he had not sufficient notice of the proclamation to enable him to attend within the time specified therein. It seems to me that section 89 prescribes a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation. The fact, however, remains that a sale has taken place; that the purchasers have acquired some sort of title, and I am not aware that this Court in exercising its revisional power has ever passed an order affecting the title of persons (outsiders) to the legal proceedings in which the order is made. I therefore direct that the proceedings before the Magistrate go no further, and must decline to make the order desired in respect of the order of attachment and sale of the property. It will be for the parties to seek elsewhere their legal remedies.

1900
January 30.

APPELLATE CIVIL.

Before Mr Justice Blair and Mr. Justice Burkill.

SHIAM LAL (PLAINTIFF) v. CHHAKI LAL AND OTHERS (DEFENDANTS).^{*}
Act No IX of 1872 (Indian Contract Act) section 23—Agreement opposed to public policy—Contract relating to purchase of land within his circle by a patwari—Act No XIX of 1873 (N.W. P Land Revenue Act) Section 257.

Held that a contract entered into by a patwari for the purchase for his benefit of land situated within his circle is a contract which is opposed to public policy, even though it may not be rendered void by the rules framed by the Board of Revenue for the guidance of patwaris.

THIS was a suit for declaration of proprietary rights in and for possession of certain zamindari property brought under the following circumstances. The plaintiff was at one time patwari of a village called Birari, and, whilst occupying that position, had purchased, in the years 1878 and 1882, certain property within his circle; but, inasmuch as such a transaction was forbidden by the Rules of the Board of Revenue, he had made the purchase in the name of Udai Ram, his uncle. The plaintiff alleged that during Udai Ram's lifetime the profits of the property were regularly paid to him; but that after Udai Ram's death the defendants, who were his representatives, denied the plaintiff's title and refused to hand over the profits. Hence this suit. The Court of first instance (Subordinate Judge of Agra) gave the plaintiff a decree. The defendants appealed. The lower appellate Court (District Judge of Agra) decreed the appeal and dismissed the suit on the findings, first, that the transaction in question was absolutely forbidden by the Rules of the Board of Revenue, which had the force of law, and, secondly, that the transaction was opposed to public policy. The plaintiff appealed to the High Court.

Munshi Ram Prasad and Pandit Sundar Lal for the appellant.

Pandit Moti Lal Nehru for the respondent.

BLAIR and BURKITT, JJ.—It is unnecessary for us to set forth the facts of this case, which will be found in the judgment of the

^{*} Second Appeal No. 572 of 1897, from a decree of F. W. Wells, Esq., District Judge of Agra, dated the 26th June 1897, reversing a decree of Mirali Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 31st March 1897.

Court below. The lower appellate Court is wrong in saying that the patwaris' rules in force in 1878 and 1882, issued by the Board of Revenue with the sanction of the Government, had the force of law. In that matter the learned District Judge is clearly mistaken. Under section 257 of Act XIX of 1873, the only rules which, after publication in the *N.-W. P. Gazette*, acquire the force of law, are the rules mentioned in cls. (a) and (b) of that section, and they are rules to be made by the Local Government itself. If the rules as to patwaris be assumed to have been made under cl. (c) of that section, they clearly have not the force of law, and practically would be no more than departmental rules made by the Board of Revenue with the sanction of the Local Government. In this matter, therefore, the Court below was wrong.

But though, in our opinion, the Court below was wrong in that matter, it does not follow that its decision must be set aside. The learned Judge has held practically that the contract relating to purchase of land within his circle, made by the patwari for his benefit, is opposed to public policy. In our opinion that finding is correct. The learned Judge very properly puts it that "it is the duty of a patwari to keep impartially the accounts of zamindars and tenants or between zamindars with conflicting interests;" and further that "no patwari can do his duty properly if he has a direct interest in property in his circle." We think that these remarks are well founded. They show how the interest of a patwari, who has acquired a proprietary title to land within his circle, conflicts with his duty as a patwari bound impartially to record matters of most vital importance to both zamindars and tenants. In the present case the plaintiff admits that having contrary to the rules purchased land in his circle, he, with the object of concealing that purchase from his superiors, took the conveyance in the name of another person. The representatives of that other person are the defendants to this suit. Their predecessor in title was, according to the plaintiff, an active party to this transaction, which transaction we regard as being entered into for purposes opposed to public policy. For the above reasons we concur in the decree of the lower appellate Court dismissing the plaintiff's suit, and we dismiss this appeal with costs.

Appeal dismissed.

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SHIAM LAL

v.

CHHAKI
LAL.

1900
February 3.

Before Mr. Justice Burkitt.

KAMLAPAT AND ANOTHER (DEFENDANTS) v. BALDEO AND OTHERS
(PLAINTIFFS).*

*Execution of decree—Suit under section 231 of the Civil Procedure Code—
Suit decreed—Appeal by decree-holders—Death of one of two joint
decree-holders—Abatement of appeal.*

A suit was instituted against two joint decree-holders under section 283 of the Code of Civil Procedure for a declaration that certain property which had been attached by them belonged to the plaintiffs, and was not liable to be taken in execution of the decree. The suit was dismissed by the Court of first instance, but decreed by the lower appellate Court. The decree-holders appealed, but during the pendency of the appeal one of them died and no steps were taken to bring his representatives on the record within the prescribed period.

Held that the appeal abated. *Ghamandi Lal v. Amir Begam* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellants.

Maulvi *Ghulam Muftaba*, for the respondents.

BURKITT, J.—In this case the plaintiffs, now respondents, instituted a suit against the defendants, now appellants, to have it declared that certain property attached by the defendants in execution of a money decree against the father of the plaintiffs belonged to the plaintiffs, and was not liable to be taken in execution of the decree against their father. The suit was dismissed by the Court of first instance, but was decreed on appeal by the Subordinate Judge. From that decree the unsuccessful defendants (the decree-holders Kamlapat and Musammat Anandi) preferred a second appeal to this Court.

That appeal came on for hearing before me sitting alone, and having heard the parties I referred an issue to the lower appellate Court under section 566 of the Code of Civil Procedure. The Subordinate Judge in reply returned the issue without any finding. He reported that Kamlapat, one of the appellants, had died, and that therefore he was unable to proceed to the trial of the issue remitted to him. The fact of Kamlapat's death was not known when the appeal originally came on before me for hearing.

* Second Appeal No. 70 of 1899 from a decree of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 18th October 1898, reversing a decree of Babu Chajju Mal, Munsif of Mainpuri, dated the 19th May 1897.

(1) Weekly Notes, 1894, p. 22.

Under the above circumstances it is contended for the respondents that the appeal has now abated, and I have to decide whether that contention is well founded or not.

It is not denied that more than six months have elapsed since the death of Kamlapat, and admittedly no application either by the co-appellant, Musammat Anandi, or by anyone on behalf of the representatives of the deceased appellant, to have his representative brought on the record, has been made. So *prima facie* it would appear that the appeal must be held to have abated. It is contended, however, that the right to proceed with the appeal has survived to the co-appellant, Musammat Anandi, and that I should act as provided in section 362 of the Code of Civil Procedure. The argument is that as the money decree passed in favour of Kamlapat and Musammat Anandi was a joint decree, Musammat Anandi is, under section 231 of the Code of Civil Procedure, entitled to sue out execution of the entire decree for the benefit of all the joint decree-holders and of the representatives in interest of any deceased joint decree-holder, and that the right to proceed with the appeal in the absence of any representative of her co-appellant has therefore survived to her. The reply to this argument is that the proceedings now before me are not proceedings in execution of a decree, but are appellate proceedings in a suit to which section 231 has no application. What I have to decide is not whether Musammat Anandi alone could prosecute execution proceedings under section 231, but whether the right to appeal from the Subordinate Judge's decree in a suit in which she and her deceased co-appellant, Kamlapat, were unsuccessful defendants survives to her within the meaning of section 362 of the Code. In my opinion that question must be answered in the negative. In the case of *Ghamandi Lal v. Amir Begam* (1) it was distinctly laid down that a Court hearing an appeal should have before it all persons whose interests might be affected by the decree in appeal. Now here there were two persons, Kamlapat and Musammat Anandi, both equally interested to procure a reversal of the decree of the Subordinate Judge by which their suit was dismissed. One of those persons died more than six months ago after they had appealed to this Court against the

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(1) Weekly Notes, 1894, p. 22.

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decree of the Subordinate Judge. No application has been made to bring his representative on the record. It has not been shown or even alleged that the deceased Kamlapat left no legal representative, or that the surviving appellant, Musammat Anandi, is such representative. It is most unlikely that she could be Kamlapat's legal representative. On this state of facts there are no materials on which I can find that the right to prosecute the appeal survived to Musammat Anandi alone. I must therefore hold that the appeal has abated. I accordingly dismiss it with costs.

Appeal dismissed.

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February 8

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

GOBARDHAN DAS (DEFENDANT) v. JAI KISHEN DAS (PLAINTIFF).^{*}
Act No. IX of 1872 (Indian Contract Act), sections 15, 16, 19—Contract—Undue influence—Coercion—Civil Procedure Code, sections 522, 526—Award—Validity of award—Award purporting to be a considered award of the arbitrators, but really an agreement between the parties to the submission.

Under section 16 of the Indian Contract Act, 1872, as it stood before it was amended by Act No. VI of 1890, it is not sufficient, in order to render a contract voidable on account of undue influence, that the party claiming to avoid the contract should have been at the time he entered into it in a state of fear amounting to mental distress which enfeebled the mind: but there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the contract *Jones v. Merionethshire Building Society* (1), referred to.

Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witnesses was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was *held* that this would not prevent the award being a valid and binding award between the parties.

THE facts of this case are fully stated in the judgment of Strachey, C. J.

Babu Jogindro Nath Chaudhri and Munshi Jwala Prasad,
for the appellant.

Pandit Sundar Lal, for the respondent.

^{*} First Appeal No. 76 of 1898 from a decree of Babu Nil Madhab Roy, Subordinate Judge of Benares, dated the 25th November 1897.

(1) L. R., 1892, J Ch., 173.

STRACHEY, C. J.—This is an appeal from a decree passed in accordance with an award which was ordered to be filed under section 526 of the Code of Civil Procedure. Having regard to the construction which has been placed upon the last paragraph of section 522, with which section 523 must be read, the only ground upon which such an appeal will lie is that there has been no award in law or in fact on which a decree could legally be passed. The only grounds upon which the award was contested in the Court below and in this Court are—(1) that by reason of coercion or undue influence exercised on the mind of the appellant there was no valid submission to arbitration; and (2) that there was no award in the sense of a judicial determination by the arbitrators of the matters submitted, but the arbitrators merely accepted a settlement of those matters by other persons, and mechanically signed an award which was put before them for their signature.

Now as regards the first point, no question of coercion properly so-called arises in this case. Coercion is defined in section 15 of the Indian Contract Act. It is clear that coercion as thus defined implies a committing or threatening to commit some act which is contrary to law. No such act is alleged to have been committed or threatened in the present case. Therefore coercion may be put out of the question altogether. The question of undue influence requires further consideration. We must apply the definition of undue influence contained in section 16 of the Contract Act, as it stood before its amendment by section 2 of Act No. VI of 1899. The only part of section 16 which has been suggested as applicable here is the second clause, which provides that undue influence is said to be employed “when a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.” If the appellant’s consent to the submission was caused by undue influence as thus defined, the contract was voidable at his option under section 19. Now the circumstances under which the submission was entered into were these. There had been certain dealings between the appellant Gobardhan Das and one Gopal Das, the son of the plaintiff-respondent Jai Kishen Das. Gopal Das was a young man of

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twenty-two. The appellant was his cousin. It appears that the appellant got Gopal Das to execute a deed of sale of Gopal Das' share in certain ancestral property. There were two deeds, one was taken in the name of Gobind Das, a relative of the appellant, and after that there was a further deed executed by Govind Das in the appellant's favour. On the 26th November, 1896, a complaint was filed before a Magistrate by Gopal Das against Gobardhan Das, in which he charged the appellants with offences of criminal breach of trust and cheating under the Indian Penal Code in connection with the execution of the deeds, and on the following day, the 27th, the Court directed that the case should be sent to the police for investigation. While it was still under investigation the submission now in question was executed on the 4th December, 1896. The submission is signed by Jai Kishen Das and the appellant Gobardhan Das. It recites a dispute between the executants; it states that "the parties are ready to have recourse to the Civil and Criminal Courts," and that therefore, at the request of some of the relatives of the parties, in order to settle the matter, they appoint certain persons as arbitrators, and declare that they will accept whatever award the arbitrators may honestly make with respect to the dispute relating to the sale deeds. On the next day, that is, the 5th December, the complainant Gopal Das presented an application to the Magistrate, in which, referring to his complaint, he stated that he could not adduce evidence in the case, and, as the police had not as yet taken any proceedings, he prayed that the case might be struck off and his original application returned without any further inquiry. The only order then made was that the application should be sent to the police. Matters remained in that position at the time when the award was made on the 24th December, 1896, and ultimately, on the 7th January, 1897, the Magistrate made an order to the effect that the complainant did not desire to proceed further with the case, and virtually shelving the complaint altogether. The award and the decree thereon were in the respondent's favour.

Now dealing first with the submission of the 4th December, we have to see whether there is sufficient evidence to justify the conclusion that the appellant's consent to it was obtained by undue

influence employed for the purpose. Returning to section 16, the question is—Does the evidence show that the appellant, while his mind was enfeebled by mental distress, was so treated as to make him consent to that to which but for such treatment he would not have consented? The appellant has given evidence himself as to the circumstances in which his consent was given. All he says on that point is this:—"I executed the arbitration agreement, having been influenced by the criminal case. If I had not affixed my signature, those persons would have got me punished. It was through this fear that I executed the deed of agreement." That is all he says. I have no doubt that the reason why he executed the submission was his fear of the criminal proceedings. A complaint was pending which had been made only a few days before. The submission itself refers to criminal proceedings. Having regard to these facts and to the further circumstances of Gopal Das' application practically abandoning the complaint on the very day after the execution of the submission, there can be no doubt that there was an implied agreement between the parties that if the appellant agreed to the submission the prosecution should be dropped, and that this, so far as the appellant was concerned, was the main object of the submission. As I have said, I have no doubt that at the time when he executed the submission he was to some extent, at all events, in fear of the criminal proceedings, but he does not say a word to suggest the conclusion that the plaintiff or anyone else took advantage of his state of mind to apply any pressure or exercise any influence to procure his consent. It cannot be held that a state of fear by itself constitutes undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement. In the case of *Jones v. Merionethshire Building Society* (1), Bowen, L. J., appeared inclined to the view that, given an agreement in consideration of a promise not to prosecute, it was a necessary or at least a reasonable inference of fact that undue influence or pressure must have been exercised and must have operated towards obtaining the agreement. See page 186 of the report. But the other

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Lords Justices concurred with Mr. Justice Vaughan Williams in the Court below in holding that there was practically no evidence of pressure or undue influence, although undoubtedly there was fear and undoubtedly an agreement not to prosecute. In India we must apply the definition of undue influence contained in the Contract Act, section 16, and taking the statements of the appellant as they stand, it appears to me that there is no sufficient evidence of the facts required by the second clause of that section. That disposes of the objection to the award so far as the submission is concerned.

Now with regard to the award itself, both the arbitrators have given their evidence and they describe what they did. Their procedure was certainly singular in one respect. One Gulab Das, the father-in law of the appellant, appears to have interested himself in the matter and he told Ballabh Das, one of the arbitrators, that the arbitrators need not trouble themselves as he would bring the award and have it signed. He and other relatives of the parties seem to have come to a settlement of the matters in dispute. They drafted an award, and Gulab Das and others, including the appellant, took a fair copy of the award to the arbitrators for signature. The arbitrators signed the award, and at the end both parties signed it also, and stated that they accepted the award. The arbitrators further state that at the same time the award was read out and that the appellant heard it read. They say that they held no meetings and gave no consideration to the matter because they thought that the dispute had been amicably settled with the consent of the parties in accordance with the draft award, and that in substance they adopted the draft, and gave their award in accordance with the settlement agreed to by both parties. If the award really represented a settlement agreed to by the parties, I see no objection to the draft being adopted and the award being made by the arbitrators in accordance with the settlement, any more than I see any objection to a Court passing a decree in accordance with an agreement arrived at by the litigants. The only peculiarity here is that the award on the face of it professes to be, not the adoption of a settlement arrived at by the parties, but the result of a judicial consideration by the arbitrators themselves of the issues which they formulate, on the

statements of the parties and on the depositions of certain witnesses ; whereas it is clear that they took no evidence and did not hold any sittings at all. But they signed the award, and the conclusion which they thus signed was accepted by the parties, who of course knew perfectly well how the settlement had been arrived at, and the award drawn up.

But it is said that in that agreement for the settlement again undue influence was exercised, so that even if there was no objection to the submission, still there was no valid agreement upon which the arbitrators could make their award, and that the arbitrators therefore could not make their award in accordance with the so-called settlement, but ought to have decided the dispute irrespective of it altogether. Having read the evidence the conclusion at which I have arrived is that there is no satisfactory proof of the exercise of undue influence in obtaining the signature of the appellant to the award. It is clear that the appellant told the arbitrators at the time that he accepted the award. He himself asked the arbitrators to sign the award after hearing it read. His statement that he signed a blank paper is clearly untrue. No doubt he states in his evidence :—" People said to me that they would get the criminal case struck off if I affixed my signature to the arbitration award. It was for this reason that I affixed my signature to it. By the word ' people ' I mean the following persons :—Har Kishen Das and Barjiwan Das." That is all the evidence by which he seeks to establish his plea of undue influence in the obtaining of his signature to the award. Harkishen Das is a relative of his own, related to him quite as closely as to the respondent Jai Kishen. There is nothing to show that Barjiwan Das had any special connection with Jai Kishen rather than with the appellant. I think that there is nothing to show the exercise of undue influence in the settlement upon which the award was made or in the signing of the award, and, that being so, the arbitrators were competent to give the award in the way they did give it with the knowledge and consent of the parties. The award was valid, and consequently no appeal from the decree founded on it can be maintained.

I think it desirable to state that I might have taken a very different view of the submission and the award if the objection

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had been taken in either the Court below or in this Court that the submission was void as being in part for an unlawful consideration, or for an object opposed to public policy within the meaning of section 23 of the Contract Act. It might very well have been contended that the submission had for its object the stifling of a prosecution for offences not compoundable under the provisions of the Code of Criminal Procedure, and if any such objection had been made, the judgments of the Court of Appeal in *Jones v. Merionethshire Building Society* (1), of Mr. Justice Stirling in *Lound v. Grinwade* (2), and of the Madras High Court in *Srirangachariar v. Ramasami Ayyangar* (3), would have required serious consideration. No such defence or issue has, however, been raised, and I do not think we should go out of our way to raise it for the appellant, when neither this Court nor the Court below has been asked to do so.

I think this appeal should be dismissed with costs.

BANERJI, J.—I also would dismiss the appeal. It was not the appellants' case in the Court below, nor is it his case in this Court, that the agreement of submission to arbitration is void on the ground that the object or the consideration of the agreement is unlawful, that object or consideration being the stifling of a criminal prosecution. No issue was joined on that point in the Court below, and no plea has been urged in the memorandum of appeal to this Court to that effect. It is not necessary, therefore, to consider that question in this appeal.

The only ground upon which the validity of the submission was questioned was that of coercion, or undue influence. It is clear that there was no coercion, and on the evidence it cannot be held that there was undue influence within the meaning of section 16 of the Contract Act. On this point I agree with the observations of the learned Chief Justice and have nothing to add.

As regards the award itself, the evidence shows that it embodies the result of a settlement come to by the parties to which both of them consented. They signed the award as indicating their acceptance of it, and it has not been proved that the appellant's consent to the settlement was procured by undue influence.

Appeal dismissed.

(1) L. R., 1892, 1 Ch., 173.

(2) () L. R., 39 Ch. D. 605.

(3) (1894) 1 L. R., 18 Mad., 189.

*Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice
Bancroft.*

1899
November 14.

IN THE MATTER OF THE PETITION OF DURGA PRASAD.*

*Civil Procedure Code, sections 372, 562—Appeal—Devolution of interest
pending appeal—Array of parties in appeal.*

By virtue of the first portion of section 582 of the Code of Civil Procedure, section 372 of the Code applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. In the matter of the petition of *Sarat Chandra Singh* (1) followed *Rajaram Bhagwat v. Jibar* (2) and *Ramji Morarji v. J. E. Ellis* (3) referred to *The Collector of Muzaffarnagar v. Husaini Begam* (4) distinguished.

THIS was an application in a second appeal to substitute as respondent a person who alleged that he had during the pendency of the appeal purchased the decree in dispute from the successful plaintiff respondent. The facts of the case sufficiently appear from the order of the Chief Justice.

Pandit *Sunilar Lal*, for the applicant.

Babu *Satish Chandra Banerji*, for the defendant appellant.

STRACHEY, C. J.—In this case an application is made that the name of the applicant may be placed on the record of an appeal pending in this Court in place of the original respondent.

The original respondent was the successful plaintiff in the suit. The applicant claims to be placed on the record as the assignee of the decree from the original respondent. It is not denied that he is such an assignee, and that the assignment was effected shortly after the institution of the appeal.

The application is opposed by the appellant on the ground that this Court has not the power at the stage of appeal to substitute for the original respondent the person who claims as assignee of the decree. That objection is based on certain observations made in a judgment of this Court in the *Collector of Muzaffarnagar v. Husaini Begum* (4).

Now that judgment appears to me to be clearly distinguishable. In the first place, it appears from the last paragraph of the judgment that the observations which have been relied upon were *obiter*, as the application was dismissed solely on the ground that

* Application in Second Appeal No. 712 of 1898, dated November 14th, 1899.

(1) (1896) 1 L. R., 18 All., 235.

(2) (1884) 1 L. R., 9 Bom., 151.

(3) (1895) 1 L. R., 20 Bom., 167.

(4) (1895) 1 L. R., 18 All., 86.

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the assignee, who was the only person apparently interested in maintaining or entitled to support the decree obtained by the original respondent, objected to being made a party. In the second place, the observations relied on were expressly limited to an expression of a doubt. In the third place (and this is the most important ground of distinction), the devolution of interest there did not take place pending an appeal, but between the passing of the decree in the Court below and the presentation of the appeal to this Court. It is not necessary for us to express any opinion one way or another as to whether, in a case of such devolution, we should follow the observations of the learned Judges in that case; but it is clear that their reasoning, especially in regard to the words "pending the suit" in section 372 of the Code, had reference to the particular circumstances of that case, and especially to the fact that the devolution of the interest took place before any appeal was instituted, and not while any suit or appeal was actually pending. On the other hand, the decision of Mr. Justice Banerji in *In the matter of the petition of Sarat Chandra Singh* (1), is precisely in point. I entirely agree with the view expressed in that case.

It may be, as was pointed out in the earlier of the two cases I have mentioned, that by reason of the concluding words of section 582 the word "suit" in Chapter XXI could be held to include an appeal in proceedings arising out of the death, marriage or insolvency of parties, and therefore would not include an appeal in such proceedings as section 372 contemplates, which do not arise out of death, marriage or insolvency. But that does not make inapplicable to section 372 as well as to other parts of the procedure of Courts of first instance the earlier part of section 582; so that although in section 372 the word "suit" may not include an appeal, the appellate Court nevertheless has in appeals as nearly as may be the same power as a Court of first instance has under section 372 in a suit. Any other view would, I think, lead to obvious anomalies. To take the present case,—the assignee is given by section 232 a power, subject to the discretion of the Court, to have the decree executed in the same manner and subject to the same conditions as the original respondent, and it

(1) (1896) I. L. R., 18 All. 285.

seems improbable that the assignee should have an express power of executing the decree and absolutely no power at all to defend that decree when attacked in appeal. I think it was to avoid that anomaly, among others, that the Legislature enacted the earlier part of section 582. Other anomalies are pointed out by Mr. Justice Banerji in his judgment. If there is no way to enable this applicant to be brought upon the record as respondent to the appeal, the result is that the appeal will go on against the original respondent who no longer holds the decree attacked and has no longer any interest in defending it. Presumably the appeal would be dealt with *ex parte*, the only person interested in maintaining the decree having no opportunity to support it, and yet, the assignment having taken place during the pendency of the appeal, the applicant, though unable to support the decree, might nevertheless be held bound by its reversal. A similar anomaly would be the result if the assignor instead of having succeeded in the Court below had lost, had appealed against the decree, and afterwards had assigned his rights. The view that the Court has the power in appeal to bring on the record the assignee of the original respondent is supported by decisions of the Bombay High Court in *Rajaram Bhagwat v. Jibai* (1), and *Ramji Mararji v. J. E. Ellis* (2). For these reasons I am of opinion that this application should be granted by adding the name of the applicant as respondent to the appeal along with the original respondent. The applicant will get costs of this application.

BANERJI, J.—I adhere to the view I expressed in *In the matter of the petition of Sarat Chandra Singh* (3), and hold that, by virtue of the first portion of section 582, section 372 applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. That view is supported by the rulings of the Bombay High Court to which the learned Chief Justice has referred. In the case of *The Collector of Muzaffarnagar v. Husaini Begam* (4), the question with which we have to deal in this case was not decided.

I agree in the order proposed by the learned Chief Justice.

(1) (1884) 1 L. R., 9 Bom., 151.

(2) (1895) 2 L. R., 20 Bom., 167.

(3) (1896) 1 L. R., 18 All., 285.

(4) (1895) 1 L. R., 18 All., 86.

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1900
February 8.

REVISIONAL CRIMINAL.

Before Mr. Justice ~~as~~ *as*
ISURI PRASAD SINGH AND OTHERS (APPLICANTS) v. UMRao SINGH
(OPPOSITE PARTIES).*

Act No. XLV of 1860 (Indian Penal Code), section 499—*Defamation.*

Statement made by an accused person in an application to a *Magistrate.*

Statement made in good faith for protection of the interests of the person making it.

In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one Umrao Singh in order to prejudice them in their defence in a civil suit which Umrao Singh had caused to be brought against them. *Held* that this statement did not amount to defamation—not because of the application of any principles of English law, for such principles did not apply to prosecutions for defamation under the Indian Penal Code—but because the statement fell within the ninth exception to section 499 of the Indian Penal Code. *Queen-Empress v. Balkrishna Fithal* (1), *In re Nagarji Trikarnji* (2), *Queen v. Purnoram Doss* (3), *Greene v. Delaney* (4) and *Abdul Hakim v. Tej Chandar Mukarji* (5) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. E. A. Howard for the applicants.

Babu Satya Chandar Mukerji for the opposite parties.

AIKMAN, J.—Proceedings had been instituted at the instance of one Balwant Singh against Isuri Prasad Singh and six other persons to have them bound over to keep the peace. Whilst the case was pending in the Court of a Magistrate of the first class, a petition was presented to the District Magistrate by Isuri Prasad Singh and the others, asking that the case might be transferred to some other Court, and that a local inquiry might be made. In this petition it was alleged by the petitioners that one Umrao Singh had got Balwant Singh falsely to institute the proceedings against them in order to prejudice them in their defence to a civil suit which Umrao Singh had caused to be brought against them. Umrao Singh coming to know of this,

* Criminal Revisional No. 789 of 1899.

(1) (1893) I. L. R., 17 Bom., 573. (3) (1865) 3 W. R., Cr. R., 45.
(2) (1894) I. L. R., 19 Bom., 340. (4) (1870) 14 W. R., Cr. R., 27.
(5) (1881) I. L. R., 3 All., 815.

prosecuted the petitioners for defamation. They have been convicted under section 500, Indian Penal Code, and sentenced, Isuri Prasad Singh to a fine of Rs. 10, and the others to a fine of Rs. 2 each. Both parties applied to the Sessions Judge—Umrao Singh asking that the case should be reported to this Court with the view of having the sentences enhanced, and the accused asking that the case should be reported with the view of having the convictions quashed.

The learned Judge has forwarded the case for the orders of this Court. He stated that, in his opinion, the convictions were right, and that it appears to him that they should either be set aside as bad in law, or that the sentence imposed on Isuri Prasad should be enhanced.

There is no doubt that the expressions used by the accused in their petition to the District Magistrate are in themselves defamatory. But the expressions complained of are undoubtedly pertinent to the case which was pending against the accused in the Criminal Court. According to English case-law the accused could not therefore be proceeded against, either civilly or criminally, for using those expressions.

There are decisions of the Bombay and Madras High Courts which, applying the principles of English law, hold that witnesses and counsel cannot be prosecuted for defamatory statements made by them as such. In one case, however, in the Bombay High Court, *Queen-Empress v. Balkrishna Vithal* (1), Telang, J., expressed an opinion that according to correct principles of construction the meaning of the words of the section of the Indian Penal Code, defining defamation, should not be limited so as to exclude therefrom any evidence given by a witness before a Court of Justice. And in a subsequent case *In re Nagarji Trikamji* (2), in which a pleader had been convicted of defamation for having, in defending his client, described the witnesses for the prosecution as "loafers," Jardine and Farran, JJ., said they were inclined to share the doubts expressed in the previous case by Telang, J, and acquitted the pleader, not on the ground of English law, but because they held that his case was covered by exception 9 to section 499 of the Indian Penal Code. The case

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(1) (1893) I. L. R., 17 Bom., 573. (2) (1894) I. L. R., 19 Bom., 340.

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of *Queen v. Pursoram Doss* (1) was somewhat similar to the present. In that case it was contended that a defendant in a criminal case was not tongue-tied, but might make use of any remarks, however defamatory *per se*, with perfect equanimity and protection from indictment or action. As to this plea Kemp, J., remarked:—"This may or may not be so, but the present case is governed by the provisions of the Indian Penal Code," and in this opinion Glover, J., concurred. In a criminal revision case (2) Phear, J., observed:—"If the facts which are the subject of the complaint fall within the limits of the definition in section 499, construed, as the section ought to be, according to the plain meaning of the words therein used, and if they are not covered by any of the exceptions to be found in the Code, then in my judgment they amount to defamation quite irrespective of what may be the English law on the subject;" and in this observation Jackson, J., concurred.

It may be true that the principles of public policy which, according to English law and some Indian decisions, ought to guard the statements of counsel and witnesses apply with equal force to the statements made by accused persons for their own protection. But, as was remarked in the case *Abdul Hakim v. Tej Chandar Mukarji* (3), when there is substantive law which can be appealed to for information and guidance, the safer course is to look there to ascertain some intelligible rule or rules by which the determination of cases like the present should be regulated. The Indian Legislature might, had it chosen, have so framed section 499 of the Indian Penal Code as to afford to parties, counsel, and witnesses in this country the same protection against indictment for defamation which they have in England. The fact remains that it has not seen fit to do so. This case therefore must, I hold, be decided according to the Indian Penal Code.

The words used in the petition being in themselves defamatory, the conviction under section 500 of the Penal Code was right, unless it can be shown that the accused are protected by one or other of the exceptions to section 499. The only

(1) (1865) 3 W. R., Cr. R., 45.

(2) (1870) 14 W. R. & Cr. R., 27.

(3) (1881) I. L. R., 3 All., 815.

exception at all applicable to this case is the ninth, which enacts that it is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it.

In this case it is clear that the imputation was made, for the protection of the interest of the accused. The question remains—Was it made in good faith? In the case *In re Nagarji Trikamji* (1) the Judges remark at p. 349 of the judgment:—"In considering whether there was good faith, *i. e.*, under section 52, due care and attention of the person making the imputation must be taken into consideration." This I understand to mean that in considering the amount of care and attention required to establish good faith, regard must be had to the position in which the person making the imputation stands at the time he makes it. In the present case the Magistrate says in his judgment "the accused ought to have ascertained whether the facts mentioned by them in the aforesaid petition were true: and it was necessary for them to prove in this case that those facts were true, but they have failed to do so." This I hold to be an incorrect view of the law, inasmuch as, considering the position in which the accused stood, it is requiring from them an undue amount of care and attention to call upon them to substantiate all that they deemed it necessary to say for the protection of their interests. The accused may have been quite mistaken in thinking that Umrao Singh had caused Balwant Singh to institute the proceedings against them. But I think the evidence adduced by them as to the enmity borne against them by Umrao Singh, the connection between him and Balwant Singh, and other circumstances, is sufficient to show that it was not unreasonable for them to entertain the belief that Umrao Singh was the real instigator of the proceedings. I am of opinion that the accused are protected by the ninth exception. I quash the convictions and direct that the fines, if paid, be refunded.

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PRASAD
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v.
UMRAO
SINGH.

(1) (1894) I. L. R., 19 Bom., 340.

1900
February 10.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice
Banerji

BIMAL JATI (PLAINTIFF) v BIRANJA KUAR AND OTHERS
(DEFENDANTS) *

Mortgage—Covenant for pre-emption of mortgaged property in favour of mortgagee—Collateral advantage—Covenant fettering redemption—Act No IV of 1882 (Transfer of Property Act), s 60

A provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced, but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness

Held, that a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property at a price fixed by reference to another share in the same village, was, *prima facie*, a good covenant and enforceable by the mortgagee *Biggs v Hoddinott* (1), *Santley v Wilde* (2) and *Oby v. Trigg* (3) referred to.

THE facts of this case are as follows. Madho Saran Singh and Bishan Saran Singh mortgaged to the plaintiff, Goshain Bimal Jati, a 9 anna 3 pie share of mauza Rampur. In the mortgage deed it was recited that the mortgagors had previously sold to the mortgagee a 4 anna share in the same village at a certain specified price; and the mortgagors, after setting forth the terms of the mortgage, proceeded to covenant that "if we, the executants, stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale consideration at which we have sold the 4 anna share, and if we transfer it to any other person such transfer made by us shall be deemed invalid and wrong as against the conditions set forth in this instrument." Notwithstanding the above covenant, the mortgagors sold the share in question by a deed of sale dated the 17th July 1897 to Ram Nandan Pande and others. The mortgagee accordingly sued upon the said covenant, alleging that it gave him a right of pre-emption over the mortgaged property.

* First Appeal No. 105 of 1898 from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 9th February 1898.

(1) 1898, 2 Ch., 307 (2) 1899, 2 Ch., 474
(3) (1722) 9 Mod., 2.

The Court (Subordinate Judge of Azamgarh) found (1) that the covenant relied on did not give to the mortgagee any right of pre-emption, (2) that the covenant was void for uncertainty within the meaning of section 29 of the Indian Contract Act, 1872, and (3) that the covenant was also void for want of consideration under section 25 of the same Act. The Court accordingly dismissed the suit. The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. A. H. C. *Hamilton*, Pandit *Sundar Lal*, and Munshi *Haribans Sahai*, for the respondents.

STRACHEY, C. J.—This is a suit by the mortgagee under a mortgage for fifteen years, executed on the 12th November 1889, to enforce against the mortgagor and his vendee of the mortgaged property, a covenant for pre-emption, alleged to be contained in the mortgage-deed. Certain lessees from the mortgagor were also made defendants. The Court below has dismissed the suit upon two grounds—first, that the covenant in question does not give any right of pre-emption to the mortgagee and is unenforceable at law, because, in the opinion of the Court, it is void for uncertainty; secondly, that the covenant was without consideration. Against this decision the plaintiff has appealed to this Court.

Now the deed of mortgage recites that the mortgagors have already sold to the mortgagee a 4-anna share in the village of Rampur. The mortgage is a mortgage of another 9 annas 3 pie share in the same village. The covenant in question is as follows:—"If we the executants stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale-consideration at which we have sold the 4 annas share; and if we transfer it to any other person, such transfer made by us shall be deemed invalid and wrong, as against the conditions set forth in this instrument." Although the word "pre-emption" is not used, and although it is not expressly stated that before transferring to any other person the property must be offered to the mortgagee at the price specified, I think there cannot be any doubt that that is the substantial meaning of the covenant. It cannot possibly

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mean that if the property were offered to the plaintiff at that price and were refused by him, the mortgagor could not transfer it to any other person. If that view is correct, then the covenant means that the plaintiff is to have an option of purchase at the price specified, and that any transfer to a third person, without first offering it to the plaintiff, is to be deemed invalid as against him. That is pre-emption and nothing else, and the Court was wrong in holding that the covenant was not one for pre-emption. I think also that the Court is wrong in holding that the agreement was void for uncertainty. It has, I think, a perfectly definite meaning, and that is the meaning which I have just stated. I think also that the Court was wrong in holding that the agreement was without consideration. There is one single and entire consideration for the mortgage-deed. The consideration for the mortgage, and for all the mortgagor's covenants, is the loan,—the advance made by the mortgagee. It follows that both the preliminary grounds upon which the Court below dismissed the suit, are wrong.

The defendant, however, seeks to uphold the decision upon two other grounds. The first is, that the stipulation of the covenant was for a collateral advantage to the mortgagee, and was therefore void according to the English authorities relating to the principle that a mortgagee is not entitled to the benefit of any stipulation contained in the instrument of mortgage for any collateral advantage, or to anything more than the security for payment of his principal, interest and costs. The answer to that contention is first, that no such doctrine is to be found in the Transfer of Property Act, 1882, which in this country governs the relations of mortgagor and mortgagee; and, secondly, that the latest English authorities show that the rule about collateral advantage is no longer recognized in England in the sense and to the extent supposed in some of the earlier cases, and that provided two conditions are secured, a mortgagee may at the time of the advance and as a term of it stipulate for a collateral advantage. The two conditions are, first, that the bargain is not an unconscionable bargain, and not the result of improper pressure, unfair dealing, or undue influence; secondly, that the right of redemption is not taken away or fettered. That is in substance

the effect of the two latest cases on the subject decided by the Court of Appeal, *Biggs v. Hoddinott* (1) and *Santley v. Wilde* (2).

Now as to the first of these two conditions, the Court below has not considered whether the bargain here was unconscionable or oppressive. It has simply dismissed the suit upon the two other grounds which I have mentioned. Whether a bargain is open to objection in reference to the first condition cannot be decided upon any general rule, but depends upon the evidence as to the particular circumstances of the bargain itself. But it is said that the stipulation here is void with reference to the second condition, that is to say, as a fetter or clog on the right of redemption. Now the condition about fettering the right of redemption only means that no bargain made at the time of a mortgage is valid, which prevents a mortgagor from redeeming upon payment of principal, interest and costs. As pointed out by Mr. Justice Shephard, that is the effect of section 60 of the Transfer of Property Act, which provides for the right of redemption, but which is not prefaced with any such words as "in the absence of a contract to the contrary." But so long as the bargain places no obstacle in the way of the mortgagor getting back his property upon payment of the mortgage money, it is not open to objection as a fetter on the right of redemption. Then is this covenant for pre-emption open to objection on this ground? It does not, it appears to me, in the least stand in the way of the mortgagor getting back the property, if and when he pays the mortgage-money. There is no provision whatever requiring the mortgagor to transfer the property to the mortgagee if he does not wish to do so. There is nothing which, assuming the mortgage-money to be paid, gives the mortgagee any further right or interest in the property. In Fisher on Mortgages, 4th edition, section 1150, it is expressly stated that "the Court will not object to a covenant in a mortgage for a right of pre-emption in the mortgagee in case the estate be sold; though he is liable to be deprived of its benefit by oppressive or fraudulent conduct"—*Orby v. Trigg* (3). The only special feature here is, that the covenant for pre-emption

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(1) 1899, 2 Ch, 307. (2) 1899, 2 Ch, 474.
(3) (1722) 9 Mod, 2.

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includes a stipulation for the price which the mortgagee is to pay in the event of the sale being made to him. The price is to be calculated with reference to the price for which the 4 annas share was previously sold. Does that particular feature in the covenant bring it within the condition invalidating bargains as fettering a right of redemption? I do not think it does. If that particular provision could be shown to be fraudulent or oppressive in the sense already stated, the matter would be different; but so far that has not been shown. I think therefore that as the suit has been wrongly dismissed upon a preliminary point, the appeal must be allowed, the decree of the Court below set aside, and the case remanded to that Court under section 562 of the Code of Civil Procedure for disposal on the merits, with reference to the other issues in the case. The appellant will get his costs of this appeal. Other costs will abide the result.

BANERJI, J.—I agree that the grounds upon which the Court below has dismissed the suit cannot be sustained. The covenant upon which the plaintiff relies is not a covenant which imposes an absolute bar upon the mortgagor's right to transfer the mortgaged property to any person other than the mortgagee, but simply gives the mortgagee a preferential right to purchase the property at the price specified in the covenant, in the event of the mortgagor electing to sell the property. This, as pointed out by the learned Chief Justice, is nothing more than a covenant conferring on the mortgagee a right of pre-emption. It is not a covenant which is void for vagueness or uncertainty, nor is it a covenant without consideration. The amount advanced under the mortgage-deed is the consideration for all the covenants contained in that deed. The learned advocate for the respondent seeks to support the decree of the Court below on the ground that the covenant in question is not legally enforceable, inasmuch as it fetters the right of redemption of the mortgagor. I am unable to accept this contention. The recent authorities in England, to which the learned Chief Justice has referred, lay down this, that a provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced, but that a covenant

conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness. The covenant in the mortgage-deed which is in question in this case does not affect the right of the mortgagor to redeem the mortgaged property upon payment of the amount due upon the mortgage. It no doubt confers a collateral advantage upon the mortgagee, but the mortgagee cannot be deprived of that advantage unless, as has been stated above, the covenant can be repudiated on the ground of its being oppressive or unfair. The question whether the covenant in this case is objectionable on the ground last mentioned, was not considered in the Court below, and it is a question which that Court may have to consider when the case goes back to it, but I agree in holding that the said covenant does not fetter the mortgagor's right of redemption, and is not open to objection on that ground. I agree in the order proposed by the learned Chief Justice.

Appeal decreed and case remanded.

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KUAR.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji.

SHLO NARAIN (PLAINTIFF) v CHUNNI LAL AND OTHERS

(DEFENDANTS) *

1900

February 12.

Civil Procedure Code, section 241—Execution of decree—Representative of party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage

Held, that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of section 244 of the Code of Civil Procedure. Madho Das v Ramji Palah (1) referred to

THE suit out of which this appeal arose was a suit for sale on a mortgage of the 5th June, 1855. The mortgage sued upon was executed pending a suit by the respondents on an earlier mortgage over the same property taken by the respondents in 1882. The respondents in that suit obtained a decree for sale on the 30th September, 1885. In his plaint in the present suit the plaintiff stated that the respondents "are impleaded as defendants on account of their decree of the 30th September, 1885,

* First Appeal No. 160 of 1898, from a decree of Maulvi Syed Saaj-ud din, Subordinate Judge of Agra, dated the 29th March 1898.

(1) (1894) I. L. R., 16 All., 286.

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and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 29,000 odd was still due to them under their decree, and that the claim was barred by section 244 of the Code of Civil Procedure. On this question the Court of first instance framed two issues. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by section 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the plaintiff raised as to such payment and as to the incorrectness of the defendants' accounts was barred by section 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree. The plaintiff thereupon appealed to the High Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the respondents.

STRACHEY, C. J.—The only question in this appeal is whether the Court below has rightly made the plaintiff's decree conditional on the payment by him to the respondents of the amount due under their decree of the 30th September, 1885. The plaintiff sued on a mortgage of the 5th June, 1885. The respondents were prior mortgagees under a mortgage of 1882. At the time when the mortgage to the plaintiff was executed a suit on the respondents' mortgage was pending. The respondents obtained a decree on their prior mortgage on the 30th September, 1885. In paragraph 8 of the plaint in the present suit for sale the plaintiff states that the respondents "are impleaded as defendants on account of their decree of the 30th September, 1885, and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their

demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 29,000 odd was still due to them under their decree, and that the claim was barred by section 244 of the Code of Civil Procedure. The issues framed by the Court below as between the plaintiff and the respondents were issues 10 and 13. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs. 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by section 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the plaintiff raised as to such payment and as to the incorrectness of the defendants' accounts was barred by section 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree.

Now whether this view is correct depends on, first, whether the plaintiff was a representative of a party to the decree of the 30th September, 1885, within the meaning of section 244; and, secondly, whether he is attempting to raise in this suit any question which under section 244 can only be determined by order of the Court executing that decree and must not be raised by separate suit.

As to the first of these questions, the plaintiff took his mortgage of the 5th June, 1885, during the pendency of the suit in which the decree of the 30th September was passed. He therefore took it subject to the decree, and the decree was binding on him so far as the property comprised in his mortgage was concerned. In the case of *Madho Das v. Ramji Patuk* (1), an opinion was expressed that a purchaser *pendente lite* from a defendant mortgagor should be treated as a representative of the defendant in execution of decree within the meaning of section 244, the reason being that such a purchaser is bound by the decree and should therefore be allowed to make any objection in the execution department which the parties to the decree or any one else bound by it would be competent to make. And it does

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(1) (1894) L. L. R., 16 All., 286.

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seem reasonable that no distinction should be made so far as the competency to make objections in execution is concerned between one person who is bound by the decree and another. A purchaser from the defendant mortgagor *pendente lite* is just as much bound by the decree as a purchaser from the judgment-debtor after the decree, and I can see no reason why he should be in an inferior position so far as section 244 is concerned. If that is a correct view as regards a purchaser *pendente lite* in a suit on a mortgage, I think that it must be equally true of a mortgagee who takes a mortgage during the pendency of such a suit. The remarks in the case of *Madho Das v. Ramji Patak*, to which I have referred, were no doubt made *obiter*. The decree against the judgment-debtor was a simple money decree, creating no charge on specific property, to which of course different considerations apply. I think, however, that the observations are sound and reasonable, and that a mortgagee taking *pendente lite*, like the present plaintiff, ought to be regarded as a representative of the mortgagor defendant in the sense that, being bound by the decree afterwards passed, he is competent, under section 244 of the Code, to raise in the execution of that decree any of the questions mentioned in that section.

The only remaining question is whether such a point is raised in the present suit and ought to have been raised before the Court executing the decree of the 30th September, 1885. The question raised—and the only question raised in the present suit—is whether that decree has been fully satisfied or not. If it has been fully satisfied, then admittedly the present respondents cannot stand in the plaintiff's way. If it has not been fully satisfied, then the plaintiff could only get a decree in the present suit conditional on his payment of whatever is due under that decree. Under cl. (c) of section 244, that question being one of the discharge or satisfaction of the decree, could only have been determined by order of the Court executing the decree, and therefore could not be determined by a separate suit. Proceedings in execution of that decree were taken from time to time, and the present plaintiff could then have raised precisely the contentions which he raises now as to the manner in which under the decrees the proceeds of the property sold should have been

appropriated. I do not say that the plaintiff cannot even now raise these contentions before the Court executing the decree. We do not now decide any question as to whether that decree has or has not been satisfied. All that we decide is that the plaintiff cannot, in the present suit, raise the contention of its being satisfied, and of the incorrectness of the defendants' account which he has sought to raise. The result is that the decision of the Court below was right as regards these respondents, and that the appeal of the plaintiff as regards them must be dismissed with costs. We extend the time for payment of the sum of Rs. 29,534 until the 9th August of this year.

BANERJI, J.—I also would dismiss the appeal. The question raised between the parties to this appeal was whether or not the amount of the decree obtained by the respondents on the 30th September, 1885, on their prior mortgage of the 26th April, 1882, has been discharged. A further question arises whether the above question can be determined in this suit by reason of the provisions of section 244 of the Code of Civil Procedure. The application of that section depends on, first, whether the appellant is a representative of a party to the suit within the meaning of that section; and, secondly, whether the question now raised is one of the questions which can be determined by a Court executing the decree under section 244. That the question raised in this suit is a question on which the application for execution of the respondents can be opposed admits of no doubt. The appellant alleges that if a proper account be taken of payments made in respect of the decree of the 30th September, 1885, in accordance with the terms of that decree nothing is due upon the decree. That is clearly a question relating to the discharge or satisfaction of the decree, and can be determined under section 244 of the Code, provided that the appellant fulfils the condition of being a representative of a party within the meaning of that section. I agree in holding that being a transferee *pendente lite*, and being thus a person who is bound by the decree, he must be deemed to be the representative of the judgment-debtor to the decree, namely, the mortgagor. This was the view held in the case of *Madho Das v. Ramji Patak* (1), and to that view I still adhere. The

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question, therefore, of the discharge or otherwise of the respondent's mortgage is not a question which could be determined in this suit. This is sufficient for the disposal of the appeal, and it is not necessary to decide whether or not, as a matter of fact, the amount of the respondent's mortgage has been fully satisfied. I concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

1900
March
1 and 2.

FULL BENCH.

Before Sir Arthur Shachey, Knight, Chief Justice, Mr Justice Banerjee and Mr. Justice Akman.

MATHURA SINGH (PLAINTIFF) v. BHAWANI SINGH AND OTHERS
(DEFENDANTS)*

Act No. XV of 1877 (Indian Limitation Act), section 14—Limitation—“other cause of a like nature” to defect of jurisdiction—Error in procedure

In cases in which section 14 of the Indian Limitation Act, 1877, is pleaded as protecting the plaintiff from the bar of limitation, if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within the meaning of section 14. It is not necessary that the cause which prevented the former Court from entertaining the suit should be a cause which was independent of and beyond the control of the plaintiff.

Hence where the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action, and there was on the plaintiff's part in the former suit no want of good faith or due diligence, the plaintiff was held entitled to the benefit of the time during which he was prosecuting the former suit, that is from the time when the plaint in that suit was filed until the time when it was returned to the plaintiffs for amendment—*Chunder Madhub Chuckerbutty v. Ram Koomar Chowdry* (1), *Brij Mohan Das v. Mannu Bibi* (2), *Deo Prasad Sing v. Pentab Kairree* (3), *Bishambhuni Haldar v. Bonomali Haldar* (4), *Ram Subhag Das v. Gobind Prasad* (5), *Jema v. Ahmad Ali Khan* (6), *Mulrick Kefart Hosseer v. Sheo Pershad Singh* (7), *Bar Janna v. Bar Ichha* (8), *Narasimma v. Muttayan* (9), *Trittha*

* First Appeal No 166 of 1898, from a decree of Maulvi Syed Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 30th March 1898

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| (1) (1866) B. L. R., Sup. Vol., 553, 6 | (5) (1880) I. L. R., 2 All., 622 |
| W. R., C. R., 184 | (6) (1890) I. L. R., 12 All., 207. |
| (2) (1897) I. L. R., 13 All., 348. | (7) (1896) I. L. R., 23 Calc., 821 |
| (3) (1883) I. L. R., 10 Calc., 86. | (8) (1886) I. L. R., 10 Bom., 604 |
| (4) (1899) I. L. R., 26 Calc., 414. | (9) (1890) I. L. R., 13 Mad., 431 |

Sami v Seshagiri Pai (1), *Subbarao Nayidu v Yagana Pantulu* (2), *Venkates Nayak v. Murugappa Chetty* (3), and *Assan v Pathurama* (4) referred to

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THE suit out of which this appeal has arisen was originally brought by three plaintiffs, Tilakdhari, Mathura Singh and Chotu Singh, for contribution on the basis of a registered agreement, dated the 19th March, 1887. The suit was filed on the 14th March, 1893. On the 21st December, 1893, the suit was dismissed for misjoinder of parties and causes of action, but on appeal to the High Court the case was remanded to the Lower Court with directions to return the plaint for amendment. The Lower Court returned the plaint for amendment on the 19th of September, 1896. The suit was then continued by Tilakdhari, the names of the other plaintiffs being struck out. On the 2nd September, 1896, the other two plaintiffs, Mathura Singh and Chotu Singh, filed separate suits. Mathura Singh's suit was dismissed as barred by limitation, and he appealed to the High Court, urging that the whole period from the 14th March, 1893, to the 23rd, or, at least the 19th September, 1896, ought to be excluded in his favour from the computation of the period of limitation.

Munshi Gobind Prasad, for the appellant, drew attention to the alteration of the wording of the section bearing upon this point in the various Limitation Act which had been passed by the Indian Legislature. In Act No. XIV of 1859, section 14, the words were "from defect of jurisdiction or other cause shall have been unable to decide upon it." Section 15 of Act No. IX of 1871, read "from defect of jurisdiction or other cause of a like nature is unable to try it," while section 14 of the present Limitation Act (XV of 1877), reads "is unable to entertain it." From these changes it is to be inferred that the Legislature intended to give a plaintiff relief where some cause, such as defect of jurisdiction, prevented the court *in limine* from considering the case on its merits.

Where there was no want of good faith on the part of a plaintiff and it was not shown that he had not been prosecuting his suit with due diligence, the authorities showed that the cause of a like nature to defect of jurisdiction need not necessarily be a cause

(1) (1893) L. J. R., 17 Mad., 299.

(2) (1895) L. J. R., 19 Mad., 90.

(3) (1894) L. J. R., 20 Mad., 18.

(4) (1897) L. J. R., 22 Mad., 494.

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wholly independent of the plaintiff. The following authorities were cited:—*Chander Madhub Chuckerbutty v. Ram Koomar Chowdry* (1), *Ram Subhag Das v. Gobind Prasad* (2), *Deo Prosud Sing v. Pertab Kavree* (3), *Jema v. Ahmad Ali Khan* (4), *Narasimma v. Muttayan* (5), *Tirtha Sami v. Seshagiri Pai* (6), *Putali Mekiti v. Tulja* (7), *Bai Jamna v. Bai Ichha* (8), *Subbarau Nayudu v. Yagana Pantulu* (9), *Venkiti Nayak v. Muragappa Chetti* (10), *Assan v. Pathumma* (11), *Mullick Kefart Hossein v. Sheo Pershad Singh* (12), *Bishambhur Halder v. Bonomali Halder* (13), *Brij Mohan Das v. Mannu Bibi* (14) and *Salima Bibi v. Sherkh Muhammad* (15).

Mr. S. Sinha, for the respondents, argued that the plaintiff in the present case had not been acting with due diligence or in good faith. As showing the absence of good faith he referred to the fact that the plaintiff, at a very early stage in the proceedings, had notice that the plea of mis-joinder had been raised; and also that he need not have waited until the plaint was returned. The suit was not prosecuted with due diligence. In addition to the rulings which had been referred to on behalf of the appellants, counsel for the respondents also referred to *Luchmun Pershad v. Nunhoo Pershad* (16), *Rajendra Kishore Singh v. Bulaky Malton* (17) and *Krishnaji Lakshman v. Vithal Rarji Renge* (18).

STRACHEY, C. J.—The only question in this case which has been referred to the Full Bench is whether the suit is barred by limitation, or whether it is protected from being barred by the provisions of section 14 of the Indian Limitation Act, 1877. The suit was a suit for contribution based on a registered agreement executed on the 19th March 1887. The plaintiff sues, alleging that he and the defendants were liable under a decree held by the Maharaja of Dumraon, that certain zamindari property

- (1) (1860) B. L. R., Sup. Vol., 553
6 W. R., C. R., 184.
(2) (1880) I. L. R., 2 All., 622.
(3) (1883) I. L. R., 10 Cal., 84.
(4) (1890) I. L. R., 12 All., 207.
(5) (1890) I. L. R., 13 Mad., 411.
(6) (1893) I. L. R., 17 Mad., 297.
(7) (1879) I. L. R., 3 Bom., 223.
(8) (1886) I. L. R., 10 Bom., 634.
(9) (1895) I. L. R., 15 Mad., 90.

- (10) (1896) I. L. R., 20 Mad., 48.
(11) (1897) I. L. R., 22 Mad., 494.
(12) (1896) I. L. R., 23 Cal., 821.
(13) (1899) I. L. R., 26 Cal., 414.
(14) (1897) I. L. R., 18 All., 348.
(15) (1895) I. L. R., 18 All., 131.
(16) (1872) 17 W. R., C. R., 266.
(17) (1881) I. L. R., 7 Cal., 367.
(18) (1887) I. L. R., 12 Bom., 625.

of his was sold in excess of his liability under the decree, and that under the agreement he is entitled to recover that excess from the other executants, that is, the defendants. The suit was instituted on the 23rd September 1896. It is admittedly barred by limitation unless the plaintiff is entitled to exclude the time during which he was prosecuting a former suit. The Court below has held that he is not entitled to exclude that time, and has therefore dismissed the suit. From that decision the plaintiff has appealed to this Court, and he relies on the first paragraph of section 14, which is as follows:—"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." The plaintiff seeks to exclude from the period of limitation the time occupied by a suit which he brought together with two other plaintiffs. That suit was brought on the 14th March 1893. It was a suit founded on the same agreement, for the same relief, and against the same defendants, as the present suit. Each of the plaintiffs claimed contribution as here, alleging that his property had been sold to an extent in excess of his liability under the Maharaja's decree. That suit was dismissed by the Court of first instance on the ground of misjoinder of plaintiffs and causes of action. On appeal by the plaintiffs this Court, on the 2nd June 1896, held that the first Court was right as regards misjoinder, as the plaintiffs were in all respects separate: their respective properties which had been sold in execution were separately held, and had been separately sold; and under the agreement the sales gave to each a separate cause of action. But this Court held that the first Court, instead of dismissing the suit, ought, under section 53 of the Code of Civil Procedure, to have returned the plaint for amendment by striking out the names of all the plaintiffs except one, who should be allowed to continue the suit alone. Accordingly this Court remanded the case under section 562 with a direction to the first Court to return the plaint for amendment in

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the manner stated. The case was therefore returned to the first Court, and on the 11th September 1896, the plaintiffs applied to that Court to make certain amendments in the plaint, or in the alternative to return the plaint, as directed by the High Court, for amendment in the manner which the High Court had suggested. On the 19th September 1896 the Court ordered that the plaint should be returned for amendment within five days, and thereupon the names of the present plaintiff and one of his co-plaintiffs were struck out from the plaint, and that suit was continued by the plaintiff Tilakdhari, alone. On the 23rd September 1896 the present suit was filed. If section 14 of the Limitation Act is applicable, I think that the plaintiff must be held to have been prosecuting the former suit within the meaning of that section from the date of its institution, the 14th March 1893, until the 19th September 1896, when the Court returned the plaint for amendment, and enabled him to be struck out of that suit, and so to file the present. In that view, if the section is applicable, this suit would be within time by one day. The question is whether section 14 applies. Up to a certain point I think that there is no difficulty. I think that there is no reason to doubt that the plaintiff prosecuted the former suit with due diligence and in good faith. It has been attempted to show want of due diligence and good faith, but the attempt has, I think failed, and I need say no more as to that. In the next place, I think that the present suit is undoubtedly founded, so far as the present plaintiff is concerned, on the same cause of action as the former suit. In the third place, I think that by reason of the misjoinder in the former suit the Court was "unable to entertain" that suit, by which I mean was unable to consider the questions involved in that suit. It was unable to entertain it by reason of sections 26, 31 and 45 of the Code of Civil Procedure, which show that plaintiffs cannot join in respect of distinct causes of action against the same defendants. In such a case either the plaint must be rejected, if not amended so as to remove the defect (and here from the nature of the case no amendment could have remedied the defect, so as to make that suit maintainable by all the then plaintiffs), or else the suit must be dismissed. In any event the Court could not have dealt with that suit upon the merits. In the fourth place, it

cannot be said that the Court was unable to entertain the former suit from defect of jurisdiction. But the question is—was the Court unable to entertain the suit from “other cause of a like nature” to defect of jurisdiction? Before dealing with these words it is necessary to bear in mind the essential object of section 14 and the principle which underlies it. The principle is, broadly speaking, the protection against the bar of limitation of a man honestly doing his best to get his case tried on the merits, but failing through the Court being unable to give him such a trial. That is the principle; and I think it is clearly applicable, not only to cases in which a man brings his suit in the wrong Court, that is, a Court having no jurisdiction to entertain it, but also where he brings his suit in the right Court, but is nevertheless prevented from getting a trial on the merits by something, which, though not a defect of jurisdiction, is analogous to that defect. Now the corresponding words in section 14 of the Limitation Act of 1859 were “or other cause.” In section 15 of the Limitation Act of 1871 the words were first introduced in their present form “or other cause of a like nature.” I think it is quite clear that in making this change the Legislature was adopting the view of the majority of the Full Bench of the Calcutta High Court in *Chunder Madhub Chuckerbutty v. Ram Coomar Chowdry* (1). The majority of the Court held that the words “other cause” in the Act of 1859 must be construed as meaning “other cause of a like nature.” Their judgments give instances of what, in their opinion, would not be causes of like nature to defect of jurisdiction. For example, in the case before them they held that those words would not apply where the plaintiff had been non-suited on account of his neglect to state in his plaint the boundaries of the land which he claimed. Other instances which they gave were the failure of a plaintiff to appear or to produce his witnesses on the day fixed for the hearing, and his failure in a suit for damages for a wrongful act to specify the act of which he complained. Sir Barnes Peacock and Mr. Justice Trevor held in effect that “other cause of a like nature” meant a cause not including any neglect on the part of the plaintiff either in stating his case or in other respects. Again, they say that it means a cause “not

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(1) (1866) B. L. R., Sup. Vol., 553; G. W. R., C. R., 184.

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connected with the plaintiff's own negligence." It is important to see why they adopt that meaning. Their reason is, that in the case of any cause which included any neglect on the plaintiff's part, he could not be said to have prosecuted the suit *bond fide* and with due diligence as required by the earlier words of the section. They do not, that is, enter into an inquiry as to what causes are of a like nature to defect of jurisdiction in the abstract and apart from section 14—an inquiry which would be difficult and perhaps impossible, and which would probably involve the laying down of propositions of dangerous generality. They seek for a test of likeness to defects of jurisdiction within the four corners of the section itself, supplied by its own words, and having reference to its requirements. Mr. Justice Jackson, who agreed with Sir Barnes Peacock and Mr. Justice Trevor, used less guarded language. He said:—"It appears to me that the inability of the Court must be either from unavoidable circumstances over which no one has any control, or something incidental to the Court itself and quite unconnected with the acts of the parties." I think that an earlier passage in the same judgment shows that this is too sweeping. As Mr. Justice Jackson himself points out, a plaintiff's going to the wrong Court can hardly be described as an unavoidable cause over which no one has any control, or as quite unconnected with the acts of the parties. Still earlier in his judgment he says that it must be shown that the Court was unable to decide the case "from some cause quite unconnected with the default or negligence of the plaintiff." Now although he there adds the word "default" to the "negligence" spoken of by Sir Barnes Peacock, he goes on to give the same reason as the Chief Justice. He says:—"To hold otherwise would be inconsistent with the use of the words *bond fide* and with due diligence." I think therefore that by the word "default" also he must have meant some act of the plaintiff inconsistent with *bond fides* or with due diligence. The result may, I think, be stated as follows:—First, if the Court's inability to entertain the suit results from any cause connected with any want of good faith or due diligence on the plaintiff's part, that cause is not of a like nature to defect of jurisdiction. Secondly, if the Court's inability to entertain the suit results from a cause quite unconnected with any

want of good faith or due diligence on the plaintiff's part, that cause is of a like nature to defect of jurisdiction. There is a third proposition which, I think, is established by later cases, namely, that, given good faith and due diligence, a cause is not prevented from being of like nature to defect of jurisdiction merely because it was in the plaintiff's own power to avoid, or resulted from his own act or from a *bond fide* mistake of law or procedure. I think that is the result of the decision of the Full Bench in *Brj Mohan Das v. Mannu Bibi* (1), and of the Calcutta High Court *Deo Prosad Singh v. Pertab Kairee* (2), and the observations of the Division Bench in *Bishambhur Haldar v. Bonomali Haldar* (3). As pointed out in the first of the Calcutta cases just mentioned, the test cannot be whether the cause was one within the plaintiff's own power to avoid, because it is equally in the plaintiff's own power to avoid suing in a Court which for defect of jurisdiction is unable to entertain the suit. Two decisions of this Court have been discussed in the argument. The first is the case of *Ram Subhag Das v. Gobind Prasad* (4). There the former suit had failed by reason of misjoinder of plaintiffs and causes of action. In the second suit this Court held that the defect in the former suit was not a cause of like nature to defect of jurisdiction, apparently because it was "a defect for which the plaintiff must be held responsible." If that means a defect which the plaintiff could have avoided, I think that this proposition is too wide for the reasons given in the passage to which I have just referred in the judgment in *Deo Prosad Sing v. Pertab Kairee*. Not a word is said as to whether the plaintiff in the former suit acted without good faith or due diligence. The next case in this Court, *Jema v. Ahmad Ali Khan* (5), is, I think, clearly distinguishable. There the former suit was dismissed on the ground that the debt sued for was due, not to the plaintiff alone, but to the plaintiff and a partner who had not joined in the suit. The judgment expressly says "it was not merely a case of procedure; it was a case of a plaintiff coming into Court and failing to prove a cause of action in himself against the defendant, and

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(1) (1897) I. L. R., 19 All., 348.

(3) (1899) I. L. R., 26 Cal., 414, at
pp 416, 417.

(2) (1883) I. L. R., 10 Cal., 86.

(4) (1889) I. L. R., 2 All., 622.

(5) (1890) I. L. R., 12 All., 207.

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thus failing to establish the defendant's liability to him, the plaintiff in the suit." Clearly the failure of the plaintiff to prove his cause of action and to establish the defendant's liability does, not, in the first place, make the Court "unable to entertain the suit," because the suit is entertained and dismissed; and in the second place, is in no sense analogous to defect of jurisdiction in the Court. The dissent which the judgment in that case expresses from the decision in *Deo Prosad Sing v. Pertab Kairee* and its approval of the decision in *Ram Subhag Das v. Gobind Prasad* must, I think, be regarded as *obiter*. I shall only refer briefly to the principal cases decided by the other High Courts which were cited to us. I agree with the decision in *Deo Prosad Sing v. Pertab Kairee* (1), which was a case of misjoinder of causes of action. In the case of *Mullick Kefait Hossein v. Sheo Pershad Singh* (2), the abortive suit was instituted on distinct causes of action against different sets of defendants severally, and it was held that the inability of the Court to entertain that suit was due to a cause of like nature to defect of jurisdiction. It is curious that the judgment does not in any way consider whether the former suit was prosecuted in good faith and with due diligence, but it may be assumed that the Court found on those questions in the plaintiff's favour. The only Bombay case that seems to be in point is *Bai Jamna v. Bai Ichha* (3), where it was held that, assuming the Court to have been within the meaning of section 14 unable to entertain the former suit, the cause was not of a like nature to defect of jurisdiction, as it was the plaintiff's own laches in not producing a registered certificate. That is substantially to the same effect as the view of Sir Barnes Peacock and Mr. Justice Trevor in the early Full Bench case in the Calcutta High Court. The view taken of the section by the Madras High Court appears to have fluctuated. In *Narasimma v. Muttayan* (4), the Court agreed with the decision in *Deo Prosad Sing v. Pertab Kairee*, but gave no reasons. In *Tirtha Sami v. Seshagiri Pai* (5), the Court disagreed with *Deo Prosad Sing v. Pertab Kairee*, but gave no reasons. In *Subbarau Nayudu v. Yagana Pantulu* (6), the former suit had failed by reason of the plaintiff having

(1) (1883) I. L. R., 10 Calc., 86.

(2) (1896) I. L. R., 23 Calc., 821.

(3) (1886) I. L. R., 10 Bom., 604.

(4) (1890) I. L. R., 13 Mad., 451.

(5) (1893) I. L. R., 17 Mad., 299.

(6) (1895) I. L. R., 19 Mad., 90.

acted in accordance with a rule made by the High Court which, by the time the suit came to be decided, was discovered to be *ultra vires*. In the subsequent suit it was held that the plaintiff was entitled to the benefit of the section because there had been no default, negligence or want of *bona fides* on his part, and the judgment of Mr. Justice Jackson in the early Calcutta Full Bench case was relied on. In *Venkiti Nayak v. Murugappa Chetti* (1), the Full Bench made what appears to me to be a rather startling extension of the principle laid down in the preceding case. They applied it to a case where the former suit had been dismissed because the plaintiff had joined certain matters without the leave required by section 44 of the Code. They do not consider how it came about that the plaintiff did not obtain, and apparently did not even apply for, the leave which the Court was perfectly competent to have given under section 44. They do not inquire whether in that respect or otherwise in the former suit the plaintiff had acted with good faith or due diligence. That case seems to me to have given section 14 of the Limitation Act a dangerously wide extension. The last Madras case is *Assan v. Pathumma* (2), a case, like the present, of misjoinder of plaintiffs and causes of action. The Court followed the previous Full Bench decision, as to which the judgment forcibly observes:—"When the provision thus applies to a proceeding which becomes abortive owing to an unauthorized joinder of matters, the joinder whereof the Court on application of the parties could have authorized, how can it consistently be held that the provision does not apply to a proceeding which fails on account of a misjoinder that the Court could not sanction and which is prohibited by the law absolutely?" Elsewhere in their judgment, no doubt, the Court held that good faith and due diligence on the plaintiff's part were proved.

I think that the result of the authorities taken as a whole, and the view which I take of the true principle, may be fairly summarized by saying that if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within

(1) (1896) 1 L. R., 20 Mad., 48

(2) (1897) 1 L. R., 22 Mad., 494

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the meaning of section 14 of the Act. I think that this view of the words "other cause of a like nature" corresponds most closely with the object of the Legislature in enacting the section as stated by me in the earlier part of this judgment. Now, applying this principle to the present case, the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action. There was on the plaintiff's part in that former suit no want of good faith or due diligence. That being so, it is immaterial that the plaintiff in framing that suit made a *bona fide* mistake of procedure. I think that in the present suit he is entitled under section 14 to the exclusion of the whole of the period from the 14th March 1893 to the 19th September 1896, that consequently the present suit was within time, and that the Court below was wrong in dismissing it as barred by limitation. That is the answer I would give to this reference to the Full Bench.

BANERJI, J.—My answer to the reference is the same as that of the learned Chief Justice. The question which we have to determine is whether the period of the pendency of the former suit should, under section 14 of the Limitation Act, be excluded in computing the period of limitation for the present suit. If that section applies, it is beyond question that the whole period from the commencement of the first suit to its termination including the period which intervened between the date of decision by the first Court and that of the institution of an appeal to this Court, should be excluded. The ruling of the Full Bench in *Ajoodhya Pershad v. Bisheshur Sahar* (1), is conclusive on this point. Now does section 14 apply to this case? Two essential conditions for the application of that section are that the first suit has been prosecuted with due diligence and that it has been prosecuted in good faith. Where negligence, or inaction, or bad faith is established against the plaintiff, he cannot avail himself of the benefit of the section. The mere fact of diligence and good faith on the part of the plaintiff being proved will not, however, make the section applicable unless the further condition is fulfilled that the Court in which the first suit was prosecuted was unable to entertain it by reason of defect of jurisdiction or other cause of a like nature. However diligent the plaintiff

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(1) N-W P, H C Rep, 1874, p 141.

may have been, and whatever may have been the amount of good faith with which he prosecuted the first suit, the cause which led to the failure of the first suit must have been a cause of the nature mentioned above and must have prevented the Court from entertaining the suit, that is, as the learned Chief Justice has remarked, from considering the questions involved in the suit. A cause like the absence of a right of action in the plaintiff will not make section 14 applicable. That was the cause in *Jema v. Ahmad Ali Khan* (1). The ruling in that case therefore is not an authority against the appellant, though it must be admitted that there are expressions of opinion in the judgment in that case which are undoubtedly against him. In the present case no question of want of jurisdiction arises. The reason which prevented the Court from entertaining the first suit *qua* the present plaintiff was a misjoinder of plaintiffs and causes of action. Is such a misjoinder a cause of a like nature to defect of jurisdiction within the meaning of section 14? This question was answered in the negative in the ruling of this Court in *Ram Subhay Das v. Gobind Prasad* (2), and that case is a direct authority against the plaintiff-appellant. The Calcutta Court, however, has held the contrary view in *Deo Prasad Sing v. Pertab Kawree* (3), and in *Mullick Kefart Hossein v. Sheo Pershad Singh* (4), and so has the Madras High Court in the recent case of *Assan v. Pathumma* (5). That case is on all fours with the present case. The rulings of the Madras High Court are, as pointed out by the learned Chief Justice, not consistent; but the tendency of that Court in recent cases has been in favour of the view taken in the case last mentioned. I agree with the rulings mentioned above, and am unable to concur with the view taken by this Court in *Ram Subhay Das v. Gobind Prasad*. The reason assigned by the learned Judges who decided that case for holding a misjoinder of causes of action not to be a cause of a similar nature to defect of jurisdiction is that it is a defect for which the plaintiff must be held responsible. But, as pointed out in *Deo Prasad Sing v. Pertab Kawree*, the plaintiff is equally responsible for filing a suit in the

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(1) (1890) I L R, 12 All, 207

(2) (1890) I L R, 2 All, 622

(3) (1883) I L R, 10 Cal, 86

(4) (1896) I L R, 23 Cal, 821

(5) (1897) I L R, 22 Mad, 491

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wrong Court. The test therefore which was applied by this Court in the case of *Ram Subhag Das v. Gobind Prasad* is not the true test. It seems to me that section 14 applies where the plaintiff has acted in good faith and with due diligence, but where he has made some *bona fide* mistake of law, procedure or fact, which has precluded the Court from considering the issues involved in the case, either by reason of absence of jurisdiction, or by reason of rules of procedure prescribed in the Code of Civil Procedure, or some other cause of a similar nature; the inability, however, of the Court to consider the case must not be due to wilful neglect or default on the part of the plaintiff. I do not think it is easy to lay down a hard-and-fast rule or to enumerate all the causes which should be regarded as of a like nature to absence of jurisdiction, but I am clearly of opinion that a cause like the one which precluded the Court from hearing the former suit of the plaintiff is a cause which comes within the purview of section 14 of the Indian Limitation Act.

The learned counsel for the respondents attempted to establish that in the present instance the plaintiff did not act with due diligence or in good faith. As showing the absence of good faith he referred to the fact that in the suit which the plaintiff jointly with Tilakdhari Singh and Chhotu Singh brought in the Shahabad Court a plea of misjoinder was raised. But it appears from the judgment in that case that the defendant's plea was to the effect that there was a non-joinder of plaintiffs, and that the Court was of opinion that there was a misjoinder of defendants. It cannot therefore be said that when the former suit was instituted in the Court below, the plaintiffs in that suit were not acting in good faith when they jointly filed their plaint. There was clearly no want of diligence on the part of the plaintiff, inasmuch as he was not in a position to bring a new suit until the plaint in the former suit was returned to the plaintiffs for amendment. For the above reasons I hold that the plaintiff's claim is not barred by limitation.

ARKMAN, J.—I also am of opinion that on the facts as set forth by the learned Chief Justice the plaintiff in this case is entitled to the benefit of section 14 of the Indian Limitation Act, 1877, and that his suit is not beyond time.

It is clear that the Legislature did not intend to limit the privilege given by that section to cases in which the civil proceeding has been instituted in a wrong Court. Had this been its intention, the words "or other cause of a like nature" would not have been found in the section. To what cases do the words just quoted refer? The question is not free from difficulty, but after careful consideration I am of opinion that the intention of the Legislature was that, given good faith and due diligence on the part of the plaintiff, he was not to suffer from any *bona fide* mistake in procedure which would have the same effect as if he had gone to the wrong Court, that is, which would have had the effect of preventing the Court *in limine* from approaching the consideration of the case on its merits. I think the Legislature endeavoured to make this intention clear by the alteration which it made when enacting Act No. XV of 1877. In the concluding words of the first paragraph of the section in the preceding Act, No. IX of 1871, the words were "a Court which is unable to try it." In the present Act for the word "try" the Legislature has substituted the word "entertain." As has been pointed out in the case of *Deo Prosad Sing v. Pertab Kaur* (1), the responsibility of the plaintiff for the mistake which led to the earlier suit being thrown out is no true criterion as to whether section 14 is applicable. It is unnecessary for me to refer to the cases which have been cited in the judgment of the learned Chief Justice and my brother Banerji. I concur in the answer proposed to be given to the reference.

On the appeal going back to the Bench which made the reference the following order was passed:—

STRACHEY, C. J., and BANERJI, J.—The result of the judgment of the Full Bench is that the decree of the Court below dismissing the suit as barred by limitation must be set aside and the case remanded to that Court for disposal on the merits under section 562 of the Code. In dealing with the agreement of the 19th March 1887, the Court will have regard to our judgment in First Appeal No. 165 of 1898, which was delivered on the 20th of February last. The appellant will have his costs of this appeal.

Appeal decreed and cause remanded.

(1) (1883) I. L. R., 10 Cal., 86.

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APPELLATE CIVIL.

Before Mr Justice Knox.

ABDUL GHAFUR (DEFENDANT) v RAJA RAM (PLAINTIFF) *
Civil Procedure Code, section 211—Mesne profits—Interest on mesne profits not given by decree—Interest not obtainable in execution—Costs of collection of rents by a trespasser in possession not to be set off against mesne profits—Execution of decree

A plaintiff sued for cancellation of a certain lease, and for ejectment of the defendant as a trespasser, and for mesne profits with interest on such mesne profits. The decree which he obtained was a decree for cancellation of the lease and ejectment of the defendant, and ordered that mesne profits should be ascertained in the execution department, but was silent as to interest. *Held* that interest on the mesne profits could not be obtained in execution of the decree. *Hurro Durga Chowdhram v Surut Sundari Devi* (1) and *Kishna Nand v. Kunwar Partab Narain Singh* (2) referred to.

Held also that as the defendant had thrust himself into an estate and not acted in the exercise of a bona fide claim of right, he was not entitled to charge collection expenses in reduction of the mesne profits. *McArthur and Co. v Cornwall* (3) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Ghulam Mujtaba, for the appellant.

Maulvi Muhammad Ishaq, for the respondent.

KNOX, J.—This appeal arises out of proceedings taken in execution of a decree passed on the 7th of December 1896 in favour of one Babu Raja Ram, respondent to this appeal. In order to understand the points which arise for determination, it will be necessary to state briefly the circumstances which gave rise to the suit in which this decree was passed. One Musammrat Sahab Jan was the original owner of the property, over which between the years 1882 and 1884 she made three successive mortgages in favour of the ancestor of Raja Ram. Upon these mortgages Raja Ram obtained a decree for sale on the 4th of August 1890. After the decision had been passed, Sahab Jan, on the 7th of November 1890, executed a lease over the same property in favour of Sheikh Abdul Ghafur, the present appellant, and three days later she preferred an appeal to the High Court from the decree in favour of Raja Ram. This appeal was

* First Appeal No 169 of 1899, from an order of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 12th August 1899.

(1) (1881) L. L. R., 3 Calc., 332.

(2) (1884) L. R., 11 I. A., 88.

(3) L. R., 1892, A. C., 75.

eventually dismissed. Upon its being dismissed, Raja Ram put the property to sale and himself purchased it. The sale was confirmed on the 20th of September 1895, and an order for delivery given seven days after. Raja Ram applied for mutation of names to be effected over the property. Abdul Ghafur resisted the application, and it was rejected. Raja Ram had therefore to sue for possession, and he did so on the 5th of September 1896, asking for further mesne profits in respect of the property, both for the time during which he had been kept out of possession and from institution of the suit until delivery of possession with interest upon the same. On the 7th of December 1896 the Court gave him a decree, which is now under execution. It is a decree for possession by which the lease given to Abdul Ghafur is to be cancelled. As regards the mesne profits, the Court added that the plaintiff is decidedly entitled to the profits from the date of his purchase, but it reserved inquiry into the amount thereof, which was to be decided in the execution department. Neither in the judgment, nor in the decree which followed, was any mention made of the interest upon mesne profits for which Babu Raja Ram Lal asked. On the 3rd of July 1899 Babu Raja Ram instituted proceedings in execution. He asked for mesne profits, including interest. The judgment-debtor took exception to the sum of Rs. 719-12-8 at which the plaintiff had assessed the sum he claimed as mesne profits. The objection raised by him was threefold. He first contended that he should be allowed a proper sum for the expenses of collection incurred by him in getting in the rents. The second objection was that the decree-holder was not entitled to interest, and the third, that the decree-holder was not entitled to any sum on account of the sir lands, of which Saheb Jan had, by virtue of the decree, become an ex-proprietary tenant. He also took exception to the sum of Rs. 12-1½ as pleader's fee on the ground that the decree did not award it. All these objections were overruled, and Abdul Ghafur now comes to this Court, and renews these objections. There was a further plea taken in appeal, namely the second plea, but this was expressly abandoned by the learned vakil for the appellant.

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I deal first with the issue—"Is or is not the decree-holder entitled to interest upon the mesne profits? The contention raised by the appellant is that as this interest was in express terms claimed, but the decree gained does not award it, it must be taken to have been in the discretion of the Court refused. To this it is replied that as the question of mesne profits was left to be determined by the executing Court, that Court had the power to confirm the decree that was passed, and was bound to construe the term mesne profits as including interest. This contention is based upon what may be termed the explanation clause to section 211 of the Code of Civil Procedure. It is therein stated that mesne profits of property mean certain profits which are defined "together with interest on such profits." I find myself unable to hold that the term "mesne profits" in the Code of Civil Procedure necessarily carries with it as an essential ingredient interest on such profits. It may, of course, and ordinarily does, include such interest, but it seems to me that section 211 leaves the matter in the discretion of the Court which determines the original suit. It is for that Court to say upon a consideration of the facts of the case whether any interest shall be allowed, and if allowed, at what rate it is to be allowed. If that Court in express terms refuses to grant interest, or if, when such interest is claimed, it passes a decree, the terms of which are silent as regards interest, it seems to me that in either case the Court which executes the decree, even when the amount of mesne profits is left for future inquiry, cannot add to the original decree interest which, as I consider, the original Court refused to grant. To do so would be, as was pointed out in a somewhat similar case by their Lordships of the Privy Council in *Hurro Durga Chowdhurani v. Surut Sundari Debi* (1) to add to the decree. The case *Kishna Nand v. Kunwar Partab Narain Singh* also decided by their Lordships of the Privy Council (2) confirms me in the belief that the question whether interest is or is not to be allowed in awarding mesne profits is a matter for decision of the Court which determines the original suit. In this last case the explanation added to section 211 was expressly

(1) (1881) I. L. R., 8 Cal., 332.

(2) (1884) L. R., 11 I. A., 88.

considered. I therefore hold that the decree-holder is not entitled to any sum as interest upon the mesne profits awarded.

As regards the question whether the judgment-debtor is entitled to charge the expenses of collection against the receipts which he has received from the land during the period he was in wrongful possession, I hold that he is not so entitled. The learned vakil for the appellant took his stand upon the decision of this Court, *Allaf Ali v. Lulji Mal* (1). His contention was that Shaikh Abdul Ghafur entered upon the property with a *bona fide* belief that he was entitled to do so under the lease he had obtained from Musammât Saheb Jan. In any case the learned vakil argued that this issue had been expressly raised by him in his written statement, and the question whether the lease was or was not a *bona fide* lease had been left undetermined. Shaikh Abdul Ghafur should therefore be given an opportunity of having this issue tried before he was fined by the refusal of the Court to allow his collection charges. He was, however, prepared that it should be determined here, as the materials for the determination were upon the record, and he pointed to the evidence of Kundan, Shahan Khan and Murgli Khan, which will be found in the printed book of the appellants in First Appeal No. 39 of 1897. All that these witnesses state is that Saheb Jan executed the lease in favour of Abdul Ghafur because she had some difficulty in collecting the rent and paying the Government revenue. This is hardly to be wondered at in the year 1890, seeing that a decree for sale of the property had been obtained, and the tenants must have felt conscious that the property was about to pass out of her hands. The evidence of Kundan above quoted and that of Mehdi Hasan, to be found in the respondent's printed book, page 1, together with the written statement of Musammât Saheb Jan Bibi at page 3 of the same book, satisfies me that Abdul Ghafur must have been cognizant of the fact that the decree ordering the sale of this very property had been obtained on the 4th of August, 1890, and he must also have known that the appeal, which he virtually filed on the very last day possible, was purely for the purposes of gaining time. This is a case in which he has, in defiance of the rights of another, thrust himself into an estate, and

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(1) (1877) I. L. R., 1 All., 518.

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not a case where he entered upon an estate in the exercise of a *bond fide* claim of right. I am not prepared to allow him charges for collection. Reliance was placed upon a passage in *Hurro Durga Chowdh ani v. Surut Sundari Debi* (1) at page 335, in which their Lordships give an opinion that the amount which might have been received from the land deducting the collection charges were the mesne profits of the land. It does not appear what were the facts of that case, and the probability is that the trespasser there was a trespasser in the exercise of a *bond fide* claim of right. Reliance was also placed upon *McArthur and Co. v. Cornwall* (2). This case, however, is a peculiar one, and the trespassers therein mentioned had hardly passed the line of trespass in exercise of a *bond fide* claim. In the present case I feel satisfied that the action of Sheikh Abdul Ghafur was purposely taken either to delay or abet the delaying of the just claims of the decree-holder.

There remains a question whether or not the decree-holder is entitled to get any rents in respect of the sir land. Here the argument is that as soon as the sale took place Musammat Sahab Jan Bibi became by process of law ex-proprietary tenant of all the sir land held by her at the time when her property passed out of her possession. The decree-holder could not obtain anything from Musammat Sahab Jan Bibi until he at first got a rent fixed by the Rent Court. That being the case nothing could be obtained in respect of these lands. This contention overlooks the possibility which the law also allows of Musammat Sahab Jan Bibi and the purchaser coming to terms by mutual agreement, that is to say, upon the day of or the day after the sale. But it is added that as Musammat Sahab Jan had, prior to the lease in favour of Sheikh Abdul Ghafur, leased all sir lands to one Din Muhammad, Sheikh Abdul Ghafur could recover nothing. The lease itself refutes this contention. The clause relating to the so-called lease to Din Muhammad confirms me in the view that Din Muhammad was a mere man of straw. Abdul Ghafur in fact entered upon this sir and realized rents from the sub-tenants, as is abundantly proved by the evidence of the patwaris and khationis. The learned vakil for the

(1) (1881) I. L. R., 8 Cal., 332.

(2) L. R., 1892, A. C., 75.

appellant said in the course of his argument that he did not object to pay what his client could have realized from Din Muhammad. This contention appears to me to be entitled to no favour, and I disallow it.

There remains the last item on account of the pleader's fee.* On this I hold that the respondent is entitled to pleader's fee in the Court below upon the sum which I now determine to be the sum payable to him.

The result is that this appeal is so far allowed that the appellant is entitled to deduct from the sum awarded against him by the lower Court the amount assessed as interest on the mesne profits. In other respects, the judgment and decree of the lower Court are confirmed. Parties will go to as in this Court and the Court below in proportion to their success and failure in this Court.

[See also in connection with the second point in the case *Sharaf-ud-din Khan v. Fatchyab Khan* (1)—Er.]

Decree modified.

REVISIONAL CRIMINAL.

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1900
March 21

Before Mr. Justice Broom

IN THE MATTER OF THE PETITION OF ABUL HASAN AND ANOTHER
*Criminal Procedure Code Sections 135—Order of the Magistrate
reversal of order of the District Judge for the trial of the
petitioner for the trial of the petitioner for the trial of the*

When a person against whom an order has been made under section 135 of the Code of Criminal Procedure applies for a jury under section 135 of the Code the applicant is bound by the verdict of the jury and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of *abuse of* *fide* claim of right.

In this case a Magistrate of the first class issued an order to the petitioners to remove certain obstructions to the old passage for cattle. The petitioners filed a written statement and prayed for the appointment of a jury under section 135 of the Code of Criminal Procedure to try whether the order was reasonable and proper. The petitioners themselves nominated two persons; two others were appointed by the complainants, and the Magistrate appointed an umpire. Three of the jurors and the umpire returned

* Criminal Revision No. 111 of 1900.
(1) Weekly Notes 1898, p. 25; I. L. R. 20 All. 203.

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a verdict that the passage sought to be opened was an old way for cattle, and that the order for its being re-opened was a proper one. The order was accordingly made absolute. Thereupon the petitioners applied to the High Court for revision, pleading that their action in closing the passage was taken in pursuance of a *bona fide* claim of title and ought not to have been thus decided by the Magistrate.

Mr. *C. Dillon*, for the applicants.

The Government Pleader (*Munshi Ram Prasad*), for the Crown.

AIKMAN, J.—An order was issued to the applicants by a duly empowered Magistrate, directing them under the provisions of section 133 of the Code of Criminal Procedure to remove an unlawful obstruction from a road which was said to be a public road, or to appear within a time fixed and move to have the order set aside. The applicants put in a petition, in which they denied that there ever was a road as asserted by the other side. Had they adhered to this position, and had the Magistrate, without considering whether the applicants' plea was or was not a *bona fide* claim of right, passed the order complained against, it would have been a case for interference in revision. But instead of adopting this course the applicants asked the Magistrate to appoint a jury, that being the third alternative given by section 135 of the Code. The Magistrate nominated the two men named by the applicants, namely, Bachu Lal and Ganesh Prasad Narain. He also appointed two men whose names were supplied by the opposite side, and he appointed as umpire one Munshi Nazir Ali, Manager of the Dubari Estate. Four persons, including the umpire, agreed in finding that the order complained of was a reasonable and proper order. The fifth person did not for some reason join the jury, and did not concur in the verdict. Amongst the four persons who agreed in finding that the Magistrate's order was a reasonable and proper one were Bachu Lal and Ganesh Prasad Narain, the two persons nominated by the applicants. I am asked to interfere in revision on the ground that there was a disputed question of title, and that therefore there was no jurisdiction to pass the order. On the facts set forth above I decline to do this and reject the application.

APPELLATE CIVIL.

1900
March 30*Before Mr Justice Barlett and Mr. Justice Aikman*

BALDEO BHARISHI (DEFENDANT) v. BIE GIR AND OTHERS (PLAINTIFFS) *
*Civil Procedure Code, section 30—Numerous persons interested similarly
 in the result of a suit—Permission given to some to sue on behalf of
 all—Permission granted after the filing of the suit*

Held, that the permission required by section 30 of the Code of Civil Procedure may be granted after the filing of suit by some only of the persons interested therein *Fernandez v. Rodrigues* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

BURKITT and AIKMAN, JJ.—In this appeal it is frankly admitted for the appellant that he has no case whatever on the merits. The learned advocate who appears for him raises a technical plea founded on the following facts. The plaintiffs are mahants of a religious body who style themselves Niranjani Akhara comprising hundred of followers and worshippers. The persons originally claiming in the plaint were the mahants or heads of this body. An objection was taken by the defendants in their written statement that the plaintiffs alone could not sue and that it was necessary that all the other members of the akhara should join as plaintiffs. Upon this an application was made by the plaintiffs, purporting to be under section 30 of the Code of Civil Procedure, asking that, as provided in that section, notices should issue to the various parties who, the defendants alleged, ought to be joined as plaintiffs in the suit, and that permission should be given to the plaintiffs to sue on their behalf. The permission asked for was granted, and the suit proceeded to trial and judgment. It is now contended (judgment having been given against the defendants) that the permission given after the suit had been instituted and after the defendants had been summoned, was a bad permission, and that therefore the trial was vitiated, and the decree a bad one. As to this contention it

* First appeal No. 185 of 1898 from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 22nd June 1898

(1) (1897) I L. R., 21 Bom., 784

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is sufficient to refer to the case of *Fernandez v. Rodrigues* (1). In that case it was held by a Full Bench that the permission required by section 30 of the Code of Civil Procedure may be given subsequently to the filing of the suit. In that decision and in the reasoning on which it was based we fully concur. As remarked by the learned Chief Justice in that case, the question is only one of adding parties. We dismiss this appeal with costs.

Appeal dismissed.

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March 27.

FULL BENCH.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Know and Mr. Justice Blair.

EDWARD CASTON (PETITIONER) v. L. H. CASTON (RESPONDENT) AND W. T. COGDILL (CO-RESPONDENT).*

Act No. IV of 1869 (Indian Divorce Act), sections 17, 20—Decree for nullity of marriage passed by a District Judge—Confirmation of decree by High Court—Period for confirmation—Effect of confirmation, if made before statutory period has elapsed—Act No. 1 of 1872 (Indian Evidence Act), sections 41, 44.

Section 20 of the Indian Divorce Act, No. IV of 1869, does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. *A v. B.* (2) dissented from.

Assuming the proviso in section 17 to be applicable to a decree of nullity, a decree by the High Court confirming the same before the six months' period has expired, cannot on that ground be treated as made by a Court not competent to make it, within the meaning of sections 41 and 44 of the Indian Evidence Act, 1872, and is therefore, under section 41, conclusive proof that the marriage was null and void.

THIS was a reference arising out of a suit for divorce pending in the Court of the District Judge of Agra. The suit was brought by the husband as petitioner against his wife and a co-respondent. In the course of the hearing the counsel for the co-respondent put in a petition in which he represented that the suit must be dismissed, inasmuch as the petitioner had never been lawfully married to the respondent. The facts upon which that contention

* Matrimonial Reference No. 1 of 1900.

(1) (1897) I. L. R., 21 Bom., 784. (2) (1898) I. L. R., 23 Bom., 460.

was based were the following:—The respondent had formerly gone through a ceremony of marriage with one Elloy. On the 18th of June 1888 she obtained a decree declaring that marriage null and void in the Court of the Judicial Commissioner of Oudh, who, until the passing of section 42 of Act No. XX of 1890, was a “District Judge” within the meaning of section 3, clause 2, of the Indian Divorce Act, for Oudh. On the 7th of December 1888 the decree of nullity was confirmed by this Court, which had jurisdiction over Oudh under section 3, clause 1, of the Act. On the 21st December 1888 the respondent was married to the petitioner. It was contended that under section 20, read with the proviso in section 17, the High Court was not competent to confirm the Judicial Commissioner’s decree of nullity until after six months from the pronouncing thereof; that the order of confirmation, having been made less than six months from the date of the decree, must be held to be illegal and void; that therefore the decree must be treated as not having been validly confirmed; and that consequently the subsequent marriage of the respondent with the petitioner was also illegal and could not be made the subject of a decree for dissolution of marriage. The District Judge accordingly stayed proceedings and referred to the High Court, under section 9 of the Indian Divorce Act, 1869, the question whether, having regard to the facts just stated, the marriage sought to be dissolved was a valid marriage.

Mr. W. K. Porter (as *amicus curiæ*) for the co-respondent. I submit that the proceedings held by the High Court on the 7th December 1888 for confirmation of the decree of nullity of marriage passed by the Judicial Commissioner on the 18th July 1888 in the suit between the respondent and Elloy were null and void, and that therefore the marriage between the respondent and Elloy has never yet been annulled. Section 20 of Act No. IV of 1869 renders applicable to decrees made by a District Judge, which the Judicial Commissioner for the purposes of these proceedings was, in a suit for nullity of marriage, the provisions of section 17, clauses 1, 2, 3 and 4. The term “clause” is nowhere defined in the Act, but, turning to section 17, it will be seen that it consists of six paragraphs. The fifth paragraph contains a material proviso to the effect that “no decree shall be confirmed under this section

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till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs." This proviso is indissolubly connected with all the four preceding paragraphs, so that, if the "clause" spoken of in section 20 means one of the paragraphs of section 17, then "clauses 1, 2, 3 and 4" must include also the fifth paragraph of section 17. If this be so, there is a direct statutory prohibition against the confirming of a decree for nullity of marriage passed by a District Judge until after six months from the date of the pronouncing thereof. I rely on the case of *A. v. B.* (1). If there has been a proceeding held within the statutory period of six months purporting to confirm such a decree, such proceeding will be of no legal validity. See the remarks made by Edge, C. J., near the commencement of the judgment in the case of *Percy v. Percy* (2).

Mr. R. K. Sorabji (as *amicus curiæ*) for the petitioner.

Section 20 of the Indian Divorce Act directs—"that the provisions of section 17 *clauses* 1, 2, 3, 4 shall, *mutatis mutandis*, apply to such decrees," *i.e.* decrees of nullity.

Section 17 contains six paragraphs. The fifth paragraph evidently applies to all the four preceding paragraphs. It can hardly be said to be a part of paragraph 4, for that paragraph makes complete sense without it; and it, in turn, is quite intelligible without reference to the particular paragraph preceding it. It, in fact, is a clause by itself, *i.e.* it is the fifth clause of section 17, and, as such, is not made applicable to decrees of nullity by section 20. If punctuation be any guide to the construction to be put on Acts of the Legislature, the full stop, in the original edition of the Act, at the end of paragraph 4, would seem to indicate that the following paragraph was not intended to be read as part of the preceding clause.

In *A. v. B.* (1) the acting Chief Justice's reference to sections of the Criminal Procedure Code to support the argument that paragraphs 4 and 5 of section 17 form one clause, is not so forcible as might at first sight appear, for it is quite evident that each of the provisos, in the sections to which he refers, has no meaning apart from the clause immediately preceding.

(1) (1898) I. L. R., 23 Bom., 460.

(2) (1896) I. L. R., 18 All., 375.

The Act very clearly shows that it saw no reason for delay in nullity decrees. Section 16 expressly provides that a decree for dissolution of marriage, passed by a High Court, should be *nisi*, and also provides for intervention. Section 17 provides for intervention during a suit for dissolution in the Court of a District Judge. As there are no such provisions with regard to suits for nullity, it is evident that the Legislature intended that there need be no delay in the confirmation of decrees of nullity.

And in reality there is no call for delay. The grounds for decrees of nullity are—(a) Impotency. (b) Consanguinity and affinity. (c) Lunacy and idiocy. (d) The existence at the time of marriage of a former husband or wife. All these are matters which are capable of direct proof at once, and are reasons which existed at the time of the marriage. The reasons for dissolution are such as arise subsequent to the marriage, and are acts of one or other party—and are less capable of proof than the reasons for nullity—and may be mere allegations, the result of collusion.

The fact that English law, at the time the Act was passed, required no delay in decrees of nullity, would have led the Legislature to have made it very clear, had they intended delay in nullity decrees in India.

Nor can it be claimed that under section 7 of the Act, the present English Procedure should govern decrees of nullity out here; for section 7 only applies English law where the Act is silent—but section 20 taken with section 17 makes it very clear what the Legislature intended with regard to delay, *viz.* that it was necessary in regard to decrees of dissolution, but not in regard to decrees of nullity.

STRACHEY, C.J.—This is a reference to the Court under section 9 of the Indian Divorce Act (IV of 1869), by the District Judge of Agra, of a question arising in a suit for dissolution of marriage pending in this Court. The suit was brought by the husband as petitioner against his wife, the respondent, and against a co-respondent. In the course of the hearing, counsel for the co-respondent contended that the petition must be dismissed on the ground that the respondent had never been lawfully married to the petitioner. It appears that the respondent had formerly gone through a ceremony of marriage with one

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Elloy. On the 18th July, 1888, she obtained a decree declaring that marriage null and void in the Court of the Judicial Commissioner of Oudh, who, until the passing of section 42 of Act XX of 1890, was "a District Judge," within the meaning of section 3, cl. 2 of the Indian Divorce Act, for Oudh. On the 7th December, 1888, the decree of nullity was confirmed by this Court, which had jurisdiction over Oudh under section 3, cl. 1 of the Act. On the 21st December, 1888, the respondent was married to the present petitioner. The contention now raised by the counsel for the co-respondent is that under section 20, read with the proviso in section 17, the High Court was not competent to confirm the Judicial Commissioner's decree of nullity until after six months from the pronouncing thereof; that the order of confirmation, having been made less than six months from the date of the decree, must be held to be illegal and void; that, therefore, the decree must be treated as not having been validly confirmed; and that, consequently, the subsequent marriage of the respondent with the petitioner was also illegal, and cannot be made the subject of a decree for dissolution of marriage. The District Judge has accordingly stayed the proceedings pending a reference under section 9 of the question whether, having regard to the fact just stated, the marriage sought to be dissolved was a valid marriage.

There are two questions to be considered. The first is, whether the High Court's decree of the 7th December, 1888, was in contravention of section 20, read with section 17 of the Act. The second is whether, if so, it follows that that decree was void and inoperative as a confirmation of the Judicial Commissioner's decree of the 28th July, 1888. In regard to the first point, reliance is placed on the decision of the High Court of Bombay in *A v. B* (1). In that case no question arose as to the effect of a confirmation made by the High Court before the time, if any, prescribed by the Divorce Act. It was a submission by a District Judge of a decree for nullity for confirmation under section 20, upon which the petitioner applied to the High Court for immediate confirmation. The Court held that it could not confirm the decree before the expiration of six months from the

(1) (1898) L. L. R., 23 Bom., 160.

pronouncing thereof, and so rejected the application with leave to renew it when the six months' period had expired. We have first to consider whether we agree with the construction placed by the Bombay High Court upon sections 17 and 20 of the Act. After the fullest consideration I am unable to agree with it. Section 20 provides that "every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section 17, clauses 1, 2, 3 and 4 shall, *mutatis mutandis*, apply to such decrees." Section 17 provides for the confirmation by the High Court of decrees for dissolution of marriage made by a District Judge. It consists of six paragraphs. The fifth paragraph is as follows:—"Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs." If this fifth paragraph is the fifth "clause" of section 17 within the meaning of section 20, then section 20 does not make it applicable to decrees of nullity of marriage made by a District Judge, and such decrees, therefore, need not wait for six months, but may be confirmed at once. If, though the fifth paragraph, it is to be regarded as the fourth "clause" of section 17 within the meaning of section 20, then section 20 makes it applicable to decrees of nullity of marriage, and such decrees, like decrees for dissolution of marriage, cannot be confirmed till after the expiration of six months from the pronouncing thereof.

Now the word "clause" used in section 20 is nowhere defined in the Act. The paragraphs into which section 17 is divided are not numbered, and so far as the form of the section is concerned there is nothing to suggest that one paragraph is more or less a "clause" than another, or that the fifth paragraph is not a clause. It is rather difficult to gather from the judgments in the Bombay case what the learned Judges considered to be the exact relation between the proviso and the other paragraphs of section 17. Mr. Justice Parsons says:—"The fifth paragraph is not, in my opinion, a clause of the section. It is a proviso to the clause which precedes it, joined to it as printed in the Government of India (Legislative Department) edition 1887 of the Acts, by a colon, and must be

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considered to be a part and parcel of the foregoing clauses, governing and controlling them, and not forming itself a separate clause." Mr. Justice Ranade says:—"The proviso appears as a separate paragraph, but it is clear from its context that it cannot be read as a separate clause from paragraph 4, which it qualifies. It does not, as the preceding four paragraphs, or the succeeding sixth paragraph, relate to distinct subject-matters." Mr. Justice Fulton holds that "the proviso governs and forms part of the fourth clause." Now if it is correct to say that the fifth paragraph is "a proviso to the clause which precedes it" and "forms part of" that clause and cannot be read as separate from that clause, it seems contradictory to say, as Mr. Justice Parsons goes on to say, that it "must be considered to be a part and parcel of the foregoing clauses governing and controlling them." Apart from this, it appears to me quite impossible to hold that the proviso merely forms part of the clause immediately preceding it. That clause relates only to cases in which the District Judge has, upon the direction of the High Court, made further inquiry or taken additional evidence. That is clearly shown by the word "thereupon." If the proviso merely formed part of that clause, it would follow that it did not apply to the far more numerous cases in which no further inquiry or additional evidence is required, and the result would be that, contrary to the obvious intention of section 17, the vast majority of decrees for dissolution of marriage might be confirmed at once. As then the proviso clearly applies to cases not falling within the preceding clause, it cannot merely form part of that clause; and if it does not merely form part of any one of the previous clauses, but governs and controls each, there can be no reason for not regarding it as itself a clause. Upon similar reasoning to that of the Bombay High Court, it would be logical to hold that paragraph 4 also was not a separate clause, as, notwithstanding the observation of Mr. Justice Ranade to the contrary, it also does not "relate to distinct subject-matters:" it is merely consequential to clause 3; and there is, in my opinion, more reason to hold that paragraph 4 forms part of clause 3, and is therefore not a separate clause, than to hold that the proviso forms part of clause 4. In regard to Mr. Justice Parsons' argument based on the colon at the end of paragraph 4, the Privy

Council in *The Maharani of Burdwan v. Krishna Kamini Dasi* (1), at page 372 of the report say (in accordance with many English authorities) that "it is an error to rely on punctuation in construing Acts of the Legislature." The soundness of this principle is well illustrated in the present instance by the fact that in the original edition of the Indian Divorce Act (see that *Gazette of India*, March 8th, 1869, p. 275), there is not a colon at the end of the fourth paragraph of section 17, but a full stop. Mr. Justice Fry proceeds to give illustrations from the Code of Criminal Procedure in support of the proposition that if in section 17 of the Indian Divorce Act the clauses had been numbered, the proviso would not have been numbered as a clause. When the sections of the Code to which he refers—sections 33, 35, 48, 57 and 123—are looked at, I think it clearly appears that they establish no such proposition. In every one of those sections it is obvious from the context that the proviso was intended to apply to, and govern the immediately preceding proposition only, and that to mark this the proviso was not separately numbered. But, for the reasons which I have just given, it is impossible to hold that the proviso in section 17 was intended to apply to and govern the fourth paragraph only. I agree with Mr. Justice Bannister, that from the point of view of consideration of expediency or public policy, such as the interests of children, the prevention of collusion, and so forth, decrees for dissolution and decrees of nullity should stand on the same footing. But the question is whether that was the view of the Legislature in 1869 when the Indian Divorce Act was passed. So far as collusion is concerned, it certainly was not. It is obvious from section 20 that the Legislature deliberately excluded from the case of decrees of nullity the last paragraph of section 17, authorizing intervention on the ground of collusion during the progress of a suit for divorce in the District Court. Further, in regard to suits tried by the High Court in its original jurisdiction, whereas under section 16 a decree for dissolution must, in the first instance, be a decree nisi, not to be made absolute for at least six months, during which period any person may show cause why the decree should not be

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(1) (1884) 1 L. R., 14 Q. B., 365.

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made absolute by reason of collusion, or concealment of material facts; on the other hand, a decree for nullity under section 18 is made absolute at once, and there is no provision for intervention. Again, in England in 1869 the same distinction obtained, and it was not until the passing of the Matrimonial Causes Act, 1873, that decrees for dissolution and decrees of nullity were assimilated in respect of confirmation and intervention. It cannot therefore be argued that there was in 1869 any *a priori* probability or presumption that because a decree for dissolution made by a District Judge had to wait for confirmation for six months, therefore the Legislature considered a similar delay as appropriate for the confirmation of decrees of nullity. Mr. Justice Ranade in connection with the Matrimonial Causes Act, 1873, relies on section 7 of the Indian Divorce Act, which provides that "subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief." In the first place, that section is "subject to the provisions contained in this Act." This shows, I think, that the principles mentioned in the section are only applicable in the absence of express provisions in the Act: they cannot be applied to construe the provisions contained in the Act, such as sections 17 and 20, or to extend or restrict the operations of those provisions. In *Abbott v. Abbott* (1), Mr. Justice Macpherson held that "section 7 of the Divorce Act applies not to points of procedure, but to the general principles and rules on which the Court is to act and give relief." Sections 17 and 20 relate to "points of procedure" only. In *A v. B* (2), it was held by Sir Charles Farran, C. J., and Mr. Justice Tyabji, that the principles and rules referred to in section 7 were not mere rules of procedure, such as the rules which regulate appeals: and I think that the same may be said in reference to the rules which regulate confirmation, especially when it is remembered that in England there is nothing which precisely corresponds to the matrimonial jurisdiction of a District Court in India, or the

(1) (1869) 4 B. L. R., 51.

(2) (1898) I. L. R., 22 Bom., 612.

confirmation of the decrees of these Courts by the High Court. I understand the practice of this Court to have been in accordance with the view that section 20 of the Divorce Act does not make the proviso in section 17 applicable to the confirmation of decrees of nullity made by a District Judge. I see no reason to think that this practice is wrong, and I am therefore of opinion that this Court had power, on the 7th December, 1888, to confirm the Judicial Commissioner's decree of nullity of the 15th July, 1883.

The next question is, assuming that by reason of the proviso in section 17 the High Court ought not to have confirmed the Judicial Commissioner's decree until after the expiration of six months from the pronouncing thereof, does it follow that the confirmation was null and void and a nullity in the face of the respondent with the petitioner involved? The District Judge in his reference assumes that the answer to this question must be in the affirmative; but he gives no reasons, and I cannot agree with him. The decree of the High Court of the 7th December, 1888, was a decree of the kind specified in section 11 of the Indian Evidence Act, 1872. It was a final decree made in the exercise of matrimonial jurisdiction, declaring the present respondent not to be the wife of the then respondent. If it was the decree of "a competent Court," then, however erroneous or irregular it may have been, it stands under the section conclusive proof that the respondent's previous marriage was a nullity. The effect of such conclusive proof can only be avoided by showing that the High Court was not "a competent Court" within the meaning of section 11, or was "a Court not competent to deliver" the decree within the meaning of section 11. Unless that can be shown, the decree is conclusive, as no fraud or collusion is suggested. The question then is, was the High Court's decree of the 7th December, 1888, "delivered by a Court not competent to deliver it?" It appears to me that this question must be answered in the negative. The High Court had undoubted jurisdiction in the suit for nullity of marriage. As regards place, it possessed the local jurisdiction defined by the Act. It possessed personal jurisdiction over the parties to that suit who were persons governed by the Divorce Act; and it had jurisdiction over the subject-matter, or the class of suit as

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disclosed in the petition for declaration of nullity. It was properly seised of the case, which was duly transmitted to it by the Court of the Judicial Commissioner, and notice of the date fixed for confirmation was duly served upon the parties, of whom the petitioner was represented at the hearing by a pleader. There was no appeal to Her Majesty in Council from the decree of confirmation, as there might have been under section 56. Since the High Court had jurisdiction in the suit, it follows that it had jurisdiction to consider and determine every question of law or fact arising in the suit. This would of course include any question of procedure, such as a question of the construction of sections 17 and 20 of the Indian Divorce Act. To illustrate this, let us suppose that at the hearing either the petitioner or the respondent had formally taken the objection that an adjournment was necessary, as under the proviso in section 17 the decree could not be confirmed until the six months' period had expired. Suppose further that, after full argument on the point, the High Court had taken a view of section 17 different from that expressed in the Bombay case, and had confirmed the decree of the Judicial Commissioner accordingly. In such a case surely the Court would not only be competent but bound to decide the question thus raised and argued. If competent to consider and decide the question, it cannot be supposed that the Court was "competent" to decide it in one particular way only. This shows that even if the decision was erroneous or irregular, the Court was nevertheless "competent to deliver" it. If not, what is the alternative? Could any Court, however subordinate, in any subsequent suit, at any distance of time, treat the High Court's decree as a nullity and the parties still husband and wife? For instance, could a creditor successfully sue the former husband in a Small Cause Court for the price of necessaries supplied to the wife after the decree, on the ground that the decree was void, as the High Court had taken an erroneous view of the proviso in section 17? Again, after the High Court's decree, could either of the parties re-marrying be prosecuted for bigamy and the children of the subsequent marriage be held illegitimate? If these conclusions would be absurd where the High Court decided the question of the construction of section 17 after argument, they must equally be so in a case

like the present. The competency or jurisdiction of the Court cannot possibly depend on whether a point which it decides has been raised or argued by a party or counsel. An express decision upon the construction of sections 17 and 20 and an implied decision must stand on the same footing. The view that the decree was a nullity by reason of the proviso in section 17 could only be supported on the principle that wherever a decision is wrong in law, or violated a rule of procedure, the Court must be held incompetent to deliver it. Such a principle is obviously unsustainable. In the first place, it is opposed to the language of sections 41 and 44 of the Evidence Act, which were undoubtedly meant to make the decrees which they refer to conclusive except in a very restricted class of cases. If the intention had been to make such decrees questionable on the ground of any legal defect or irregularity, very different expressions would have been used, and it would be inaccurate to describe such decrees as constituting "conclusive proof." In the second place, if the principle were sound, any judgment might be collaterally attacked by contending that it was in violation of such rules of procedure as the rule of *res judicata* contained in section 13 of the Code of Civil Procedure, or the rule of limitation contained in section 4 of the Limitation Act, 1857. These rules are expressed in language as peremptory as that of the proviso in section 17 of the Divorce Act; but it has never been held, and it could not be held, that a Court which erroneously decrees a suit which it should have dismissed as time-barred, or as barred by the rule of *res judicata*, acts without jurisdiction and is not competent to deliver its decree. The insecurity of titles and of status arising from the adoption of such a principle is just what sections 41 and 44 of the Evidence Act were intended to prevent. The sections recognize that, given the competency of the Court, even error or irregularity in the decision is a less evil than the total absence of finality which would be the only alternative. In the third place, the judgment of the Privy Council in *Amir Husein Khan v. Shero Bahadur Singh* (1) shows that, even for the purposes of direct attack in revision under section 622 of the Code of Civil Procedure, a decree cannot be held to have been made without jurisdiction

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(1) (1884) 11 L. R., 11 Cal., p. 6; 11 L. A., 237.

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or illegally, merely because it is wrong in law or alleged to be in violation of such rules of procedure as those contained in sections 13 and 13 of the Code. If so, then *à fortiori* such a decree could not be regarded as made without jurisdiction for the purposes, not of direct but merely collateral attack in a subsequent suit. In *Sardarmal Jagannath v. Arunachal Sabhapathy Moodliar* (1), a judgment-creditor sought to maintain an attachment on the property of his debtor who had previously been adjudicated an insolvent by the Madras Insolvent Court, and to resist a claim by the Official Assignee, under section 278 of the Code, for the release of the property from attachment, on the ground that the order of adjudication and the vesting order were null and void, and gave no title to the Official Assignee, inasmuch as the original petition to the Insolvent Court disclosed no act of insolvency on which an order of adjudication could legally be passed under the Statute. I held that as the Madras Court was undoubtedly competent to deal with the petition, and was both competent and bound to consider whether the acts alleged in the petition constituted acts of insolvency within the meaning of the Statute, the order, even if wrong in law, was not one which the Madras Court was not competent to deliver within the meaning of section 44 of the Evidence Act, and that therefore it could not be treated in collateral proceedings as null and void, but was conclusive of the insolvency and of the Official Assignee's title. At page 214 of the Report, I said :—"Once recognize that a Court is competent to decide a suit or a petition in insolvency or any other matter, and it follows that it is competent to decide all questions which arise in that matter, whether they are questions of fact or of law, and whether they appear on the face of the plaint or petition or arise subsequently. If it decides them wrongly, its decision may be subject to reversal on appeal or otherwise, but cannot be treated as a nullity." The same principle is, I think, recognized in the judgment of Mr. Justice Knox and Mr. Justice Aikman in *Durga Prasad v. Mahabir Prasad* (2). The English, Indian and American authorities collected in Mr. Hukm Chand's learned *Treatise on the Law of Res Judicata*, Chap. VII, sections 186, 187, 189, 190 and 192, establish that for the purpose of showing

(1) (1896) I. L. R., 21 Bom., 205.

(2) Weekly Notes, 1899, p. 199.

in collateral proceedings that a judgment is void for want of jurisdiction or competency in the Court, it is not sufficient to show error in law, irregularity in practice, or departure from the provisions of the law of procedure, as for instance, by taking the proceedings at a wrong or an improper time. In one American case cited at p. 475, it was said, "the principle is so well settled that it is said to be an axiom of the law, that when a Court has jurisdiction over the subject-matter and the parties, its judgment cannot be impeached collaterally for errors of law, or irregularity in practice." In another American case cited at page 476, it was said:—"Jurisdiction having been obtained, the fact that the judgment was rendered sooner than it should have been, does not make the judgment void: a judgment thus rendered is irregular only." The whole subject is elaborately discussed by a learned American author, Mr. Vanfleet, in his work "The Law of Collateral Attack on Judicial Proceedings" (see especially Chapter VIII). In Chapter XIV, sections 710, 711, 712 and 713, the author gives instances to show that a "premature judgment," that is, a judgment given before it ought to have been given according to the law of procedure, cannot therefore be treated in collateral proceedings as void and given by a Court without jurisdiction. "An administrator's order to sell land could not be granted lawfully until after the final account of the personal assets had been settled; but an order granted before that had been done is not void. The Missouri Statute required the Court to delay the approval of an administrator's or guardian's sale of land until the next term after it was made, but such a sale is not void because approved at the same term or an adjourned term."

For these reasons I would answer the reference by saying that, in our opinion, the marriage of the respondent with the petitioner was not invalid by reason of any want of jurisdiction in the High Court's decree of the 7th December, 1888.

I desire to repeat what I stated at the hearing, that the Court is much indebted to Mr. Porter and Mr. Sorabji, who appeared as *amicus curiæ* for the co-respondent and the petitioner, respectively, for the assistance rendered to the Bench by their very able argument.

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KNOX, J.—I fully concur both in the reasons and in the conclusions arrived at by the learned Chief Justice, and have nothing further to add.

BLAIR, J.—I also entirely concur in the conclusions arrived at by the learned Chief Justice and in the reasoning on which those conclusions are based. I have only one addition to make. It is that, in my opinion, the judgment of a Bench of this Court confirming the decree for nullity of marriage is an authority on the question of law whether for the validity of such a confirming order a delay of six months is necessary. The Bench which implicitly decided that the six months' delay imposed in cases of dissolution of marriage was not necessary in cases of nullity was a Bench similarly constituted to the present, and of co-ordinate authority; and, if not by strict law, by the comity of the Courts, the law in such a decision ought to be taken as authoritative until declared to be erroneous by a Full Bench of the Court. *A fortiori* it was not open to an inferior Court to question the decision of any Bench of this Court. It is impossible to draw the inference which appears to be suggested by the District Judge that the matter was not considered and decided by the Bench of this Court which confirmed the decree of nullity. It was necessary as a foundation for the order which it made that it should have adjudicated on that question and decided that the six months' delay was not in that case imposed by the law. Therefore on authority as well as on the reasoning set forth in detail in the learned Chief Justice's judgment I would make the same answer to this reference.

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Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burdett and Mr. Justice Ashtan

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(DEFENDANT) *

Act No. IV of 1882 (Transfer of Property Act), Section 82—Mortgage—Purchase by mortgagee at auction of portion of the mortgaged property—Effect of such purchase in reducing the mortgage debt.

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect

* Second Appeal No. 221 of 1897 from a decree of Maulvi Muhammad Snaj-ud-din, Subordinate Judge of Agra, dated the 22nd December, 1896, reversing a decree of Maulvi Muhammad Fida Husain, Munsif of Agra, dated the 30th of June, 1896.

of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. *Lalhindas Ramdas v. Jannadas Shankar Lal* (1) followed. *Nand Kushore v. Raja Hariraj Singh* (2), and *Simera Kuar v. Bhagwant Singh* (3), and *Chivna Lal v. Aic, di Lal* (4), considered *Mahabhar Pershad Singh v. Moenagites* (5). *Nawab Azmat Ali Khan v. Jawahar Singh* (6), and *Mahab Singh v. Misra Lal* (7), referred to.

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THE facts of the case are as follows:—Balak Ram, the ancestor of the defendants, made a simple mortgage for Rs. 1,000 in favour of Jai Gopal, the plaintiffs' ancestor, on November 3rd, 1885. In 1893 the property mortgaged was advertised for sale in execution of a decree of one Kunj Behari and another. As the amount of the decree of Kunj Behari was only Rs. 1,155-1-9, only half of the property was sold by auction and it was purchased, on November 21st, 1893, by the plaintiffs for Rs. 1,500. At the time of the auction sale an application was made to notify the amount of the mortgage-money. The plaintiffs, alleging that as they had purchased only half of the property, one-half only of the mortgage-debt had been discharged, brought a suit against the defendants claiming that the remaining half of the property in the hands of the defendants was liable for the other half of the mortgage-debt, together with interest, and asking that that amount might be awarded to them and in default of payment sale of that half of the property which remained with the defendants. The defendants objected that, the plaintiffs having purchased half of the property, the whole hypothecation debt should be charged against that half.

The first Court decreed the claim for a moiety of the principal and dismissed the claim for interest. The lower appellate Court allowed the appeal of the defendants, dismissing the suit of the plaintiffs on the ground that the property purchased by them was worth, approximately, Rs. 3,000, and that as they had purchased it for Rs. 1,500 only it must be taken that they purchased it for Rs. 1,500 plus Rs. 1,000, the mortgage-money

(1) (1896) I. L. R., 22 Bom., 304.

(2) (1897) I. L. R., 20 All., 23.

(3) Weekly Notes, 1895, p. 1.

(4) (1896) I. L. R., 19 All., 196.

(5) (1889) I. L. R., 16 Cal., 692.

(6) (1870) 13 Moo., L. A., 404.

(7) N.-W. P., H. C. R. p., 1897, p. 58.

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due to them, and which mortgage was duly proclaimed at the time of the sale of half the property.

Pandit *Sunder Lal*, with whom was *Munshi Ram Prasad*, for the appellant.

Where several parcels of property are jointly mortgaged to secure a mortgage-debt, in the absence of a contract to the contrary each parcel is jointly and severally liable for the whole debt due to the mortgagee. If one of these parcels is purchased by a person other than the mortgagee, it may be sold in execution of the decree obtained by the mortgagee on his mortgage. As between themselves each parcel is liable to contribute rateably to the debt secured by the mortgage (*vide* section 82 of Act IV of 1882). The parcel purchased by the stranger from the mortgagor as between it and other mortgaged parcels was liable to contribute its quota of the mortgage-debt apportioned according to the valuation of each of the mortgaged parcels and so was every other parcel mortgaged.

If the whole of the mortgaged debt was recovered by sale of the parcel purchased by the stranger, the owner of this parcel could claim contribution from the owners of the other parcels for the sum recovered from it in excess of its proper quota, under section 82 of Act IV of 1882.

If the mortgagee himself purchased one of the parcels, as owner of the parcel purchased, he is bound to pay to himself the quota of the mortgage-debt for which the parcel in question is liable under the rule formulated in section 82 of Act IV of 1882. In such case there is a confluence of the estates of the mortgagor and the mortgagee in the same person, and to the extent of the quota of the mortgage-debt, for which this property is liable, the mortgage is extinguished, the balance of the mortgage-debt being still recoverable by the mortgagee. The last paragraph of section 60 of Act No. IV of 1882 is based on the same principle. Where the mortgagee himself purchases a part of the mortgaged property, the remainder of the mortgaged property might be redeemed "on payment of a proportionate part of the amount remaining due on a mortgage." These propositions are supported by the following cases:— *Nawab Azmat Ali Khan v. Jawahir Singh* (1), *Mahtab Singh v. Misri Lal* (2),

(1) (1870) 12 Moo., I. A., 404. (2) N.-W. P. H. C. Rep., 1867, p. 88.

Kesree v. Seth Roshan Lal (1), *Sobha Sah v. Interjeet* (2), *Nathoo Sahoo v. Lalah Ameer Chand* (3), *Gossyen Luchmee Narain Poori v. Biceram Singh* (4), *Hardy Narain v. Syed Allroollah* (5), *Bisheshar Singh v. Lark Singh* (6), *Lakhmadas Ramdas v. Jannadas Shankar Lal* (7), *Flint v. Howard* (8).

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The Honorable Mr. Justice Aikman referred to *Maharajah Kishen Partab Sahce Bahadur v. Laltz Nund Coomar Singh Parray* (9), *Sheonath Doss v. Junki Prosad Singh* (10). These cases support the appellant's contention. A mortgagee purchasing a part of the mortgaged property at a public auction with the leave of the Court is exactly in the same position as a stranger purchaser.

The rule laid down in *Sumeru Kuar v. Bhagvaznt Singh* (11) is based on no principle. On this rule the liability of each parcel of the property would depend:—(a) upon who the purchaser is at the public auction, whether he is the mortgagee himself or a stranger; (b) upon the fluctuations of the market at the sale of each parcel of the mortgaged property.

In the case, say of a mortgage of ten parcels of property, the amount for which the last parcel is liable to the mortgagee, would fluctuate with the prices fetched by each of the nine other parcels and upon the purchaser of the parcel being the mortgagee or a stranger. The true rule is the one on which the last paragraph of section 60 and section 52 of Act IV of 1882 are based.

The principle upon which the ruling of the majority in the Full Bench in *Nand Kishore v. Raju Hariraj Singh* (12) is based also supports my case.

The reason for the rule I contend for is thus explained in N.-W. P. H. C. Rep., 1873, at p. 150:—

“The reason of this is obvious. The whole estate as to one “portion of the property has merged in the mortgagee, and the “mortgagor, if compelled to redeem by payment of the whole debt, “would have to sue the mortgagee for contribution afterwards

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| (1) N.-W. P. H. C. Rep., 1870, p. 4. | (7) (1876) I. L. R., 22 Bom., 301. |
| (2) N.-W. P. H. C. Rep., 1873, p. 148. | (8) L. R., 1893, Ch. D., Vol. 11, p. 54. |
| (3) (1875) 15, B. L. R., 303. | (9) (1876) 25 W. R., 388. |
| (4) (1879) 4, C. L. R., 291. | (10) (1885) 1 L. R., 16 Cal., 132. |
| (5) (1878) I. L. R., 4 Cal., 72. | (11) Weekly Notes, 1895, p. 1. |
| (6) (1883) I. L. R., 5 All., 257. | (12) (1897) I. L. R., 20 All., 23. |

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"and thus by two suits between the same parties attain the
 "result which, under the law as above interpreted, is now attained
 "by one suit."

Pandit *Madan Mohan Malaviya* for the respondent.

BANERJI, J.—This appeal has arisen in a suit brought under section 88 of Act No. IV of 1882 for sale upon a mortgage, dated the 3rd of November, 1885. A moiety of the mortgaged property was sold by auction on 21st of November, 1893, in execution of a simple decree for money held by other creditors of the mortgagor, and was purchased by the mortgagee subject to the above mortgage. The plaintiffs, who represent the mortgagee, seek in this suit to bring to sale the other moiety of the mortgaged property for recovery of a moiety of the amount due upon the mortgage. The Court of first instance made a decree in favour of the plaintiffs for one-half of the principal amount of the mortgage and dismissed the claim for interest. Upon the appeal of the defendant, who represents the original mortgagor, the lower appellate Court dismissed the suit. The Court found that the market value of the moiety of the mortgaged property purchased by the mortgagee, if sold as unincumbered property, was Rs. 3,000; that the price paid for it by the mortgagee was Rs. 1,500, and that the difference between those two sums was equal to the amount due upon the mortgage. The Court held that the purchase by the mortgagee had thus the effect of fully discharging the mortgage, and that the plaintiffs' claim was not therefore maintainable. The correctness of this conclusion has been challenged in this second appeal, and it is contended that the purchase of a moiety of the mortgaged property by the mortgagee extinguished the mortgage debt to the extent of one-half only, and not in its entirety.

The view of the Court below is supported by the ruling in *Sumera Kuar v. Bhagwant Singh* (1). Having regard to that ruling and certain observations contained in the judgments of my brother Blair and myself in the Full Bench case of *Nand Kishore v. Raja Hariraj Singh* (2), this case has been referred to a Full Bench.

In some of the earlier cases decided by this Court, it was held that the mere fact of the mortgagee buying a part of the mortgaged

(1) Weekly Notes, 1895, p. 1. (2) (1897) I. L. R., 20 All., 23.

property subject to his mortgage had the effect of totally extinguishing the mortgage. This view was dissented from in the Full Bench ruling referred to above, and it was held that such a purchase "has not necessarily the effect of fully discharging the mortgage." To what extent the mortgage should be held to have been discharged by the purchase was not decided in that case. That question, however, arises in this appeal, and is the only question to be determined by the Full Bench.

It is urged on behalf of the appellants that the price paid by the mortgagee for the portion of the mortgaged property purchased by him is not, in the absence of fraud, a material factor in determining the extent of the mortgage debt which is extinguished by the purchase, and that in each case the amount by which the mortgage debt is reduced, is that portion of it for which the property purchased was proportionately liable. After careful consideration I am of opinion that this contention is valid.

When several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt; but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. This is the rule enunciated in section 82 of the Transfer of Property Act, 1882. The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to to that extent. There can be no doubt that if persons other than the mortgagee purchase different parcels of the mortgaged property, their liability, *inter se*, is, as stated above, proportionate to the relative value of the property purchased by each of them, and it is immaterial what price was paid for it. If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property, and this right subsists even if the price of the parcel purchased by him was grossly inadequate, and the difference between that price and the actual market value of the property was in excess, not only of the amount of the proportionate liability of the property, but also of the whole amount

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of the mortgage debt. For instance, if three parcels of property, each of the value of Rs. 500, are mortgaged to secure a debt of Rs. 300, each parcel is liable for Rs. 100. If one of them be purchased at auction for Rs. 50 and the purchaser be compelled to discharge the mortgage, he would be entitled to claim from the mortgagor or purchasers of the other two parcels Rs. 200, the amount for which those parcels were liable, although he himself benefited immensely by his purchase. The above is no doubt an extreme case, but it is not one which is wholly inconceivable. In such a case the price paid by the purchaser is never taken into account, and it has never been held that any equities exist as between him and the mortgagor or the purchasers of the remainder of the mortgaged property. Upon this point there is no controversy.

Does the case become different if the purchaser of a part of the mortgaged property be the mortgagee himself? When he buys a portion of that property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, become vested in the same person, and the result is that a part of the mortgage debt is wiped out by reason of this fusion of interests, and the balance only is recoverable from the remainder of the mortgaged property. It is in consequence of this confluence of interests and the discharge of a portion of the mortgage debt, that upon the mortgagee purchasing a part of the property, the integrity of the mortgage is broken up, and the mortgagee is not allowed to recover the whole amount of the debt from the remainder of the property. As has been already stated, each parcel of the mortgaged property is liable for the debt rateably to its value. Therefore when the rights of the mortgagee and the mortgagor become vested in the same person, only so much of the debt can be held to have been discharged as was proportionate to the value of the property in respect of which the confluence of rights takes place. There appears to be no difference in this respect between the case of a purchase by a stranger and that of a purchase by the mortgagee. When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, all that the mortgagor or other person interested in the remainder of the mortgaged property can claim is, that he should not be placed in

a worse position than that in which he would have been had the purchase been made by an outsider ; that is to say, that the property in his hands should not be rendered liable for a larger amount than the sum with which it would have been chargeable in the case of a purchase by a stranger. In the latter case, if the mortgagor or other owner were compelled to discharge the whole of the debt he would be entitled to contribution from the purchaser rateably to the value of the property purchased by him. In the case of a purchase by the mortgagee there appears to be no reason why the mortgagor or his representative should be allowed anything beyond a right to have his liability reduced to the same extent as in the case of a purchase by an outsider, and this seems to be the only equity to which he is entitled. It has been held by the Privy Council in *Mahabir Pershad Singh v. Macnaghten* (1), that a mortgagee who buys the mortgaged property at auction with the leave of the Court is not a trustee for the mortgagor, and is in the same position as any independent purchaser. As against the mortgagee, therefore, no higher equity exists in this respect in favour of the mortgagor than that which exists against any other purchaser. These considerations were overlooked in the case of *Sumera v. Bhagwant* (2), and in my judgments in *Chunna Lal v. Anandi Lal* (3), and *Nand Kishore v. Raja Hariraj Singh* (4). When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property for a grossly inadequate value, it no doubt appears at first sight that an injury has been done to the mortgagor, and that the mortgagee has taken advantage of his position. That was the case in *Sumera v. Bhagwant* (2). But where no fraud has been perpetrated and no undue advantage has been taken by the mortgagee, and he has purchased the equity of redemption in good faith, like any other independent purchaser, there is obviously no reason for placing him in a worse position than any other purchaser.

In *Nawab Azmat Ali Khan v. Jawahir Singh* (5), where the mortgagee had purchased a part of the mortgaged property, their Lordships of the Privy Council observed that the proportion of the debt chargeable on each village ought to vary

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(1) (1889) I. L. R., 16 Cal., 682.

(3) (1896) I. L. R., 19 All., 196.

(2) Weekly Notes, 1895, p. 1.

(1) (1897) I. L. R., 20 All., 23

(5) (1870) 13 Moo., L. A., 401.

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according to the actual value of the village, and the plaintiff in that case was allowed to redeem the village Hosseinpore purchased by him upon payment of the proportion of the mortgage debt thus chargeable on his village. The actual value paid by the mortgagee for the villages purchased by him was not taken into account.

In *Mahtab Singh v. Misri Lal* (1), this Court held in a case similar to the case cited above that each purchaser, including the mortgagee, had "bought subject to a proportionate share of the "burden," and that the plaintiff was entitled to redeem the village purchased by him on payment of such portion of the mortgage debt "as is proportionate to the relative value of the mortgaged "properties."

The case which most resembles the present is that of *Lakhmidas Ramdas v. Jamnadas Shankar Lal* (2). In that case three properties were mortgaged to the plaintiff for Rs. 90. In execution of a simple decree for money the equity of redemption in one of those properties, namely, a house, was sold by auction and purchased by the plaintiff-mortgagee for Rs. 2-2. He sold it to one Francis for Rs. 100, and subsequently brought his suit to recover Rs. 90, the whole of his mortgage money, by sale of the two remaining properties. The suit was dismissed by the Court of first instance, on the ground that the plaintiff had realized Rs. 100 by the sale of the property purchased by him, and that therefore nothing was due. Farran, C. J., held "that the plaintiff, when he purchased the equity of redemption in the house, "purchased it subject to its due proportion of the mortgage debt. "That portion of the mortgage debt thus ceased to exist, and the "plaintiff's right as mortgagee to recover the money secured by "his mortgage was reduced to that extent. What proportion of "the mortgage debt was thus wiped out depends upon the proportion of the value of the house to the value of the rest of the "mortgaged properties." This is an instructive case, and shows that the price paid by the mortgagee is not to be taken into account in determining the extent of the mortgage debt discharged by the purchase made by the mortgagee. Upon further consideration, I am of opinion that the rule laid down by the Bombay

(1) N. W. P., H. C. Rep., 1867, p. 88. (2) (1896) I. L. R., 22 Bom., 304.

High Court is the true rule, and that when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. It is not necessary to say in this case whether the same result will ensue if the purchase by the mortgagee is made under a private contract with the mortgagor and not at auction.

The learned vakil for the respondent referred to the rulings in *Gokaldas v. Puran Mal* (1), and *Hari v. Tara Prasanna* (2), and section 90 of the Indian Trusts Act. The first case has no bearing upon the question before us, and, having regard to the decision of the Privy Council in *Mahabir Pershad Singh v. Macnaghten* (3), the argument based on the other ruling and on section 90 cannot prevail.

As the mortgagee in this case purchased a moiety of the mortgaged property, the mortgage debt became extinct to the extent of a moiety only, and the plaintiffs were entitled to recover the other moiety by the sale of the remainder of the mortgaged property. The Court of first instance granted them a decree for a half of the principal mortgage amount. The plaintiffs submitted to that decree and did not appeal. They are not therefore entitled to a decree for a larger amount than that decreed to them by the first Court. The result is that I would allow this appeal with costs, set aside the decree of the Court below with costs, and restore the decree of the Court of first instance.

STRACHEY, C. J.—I concur in the judgment of my brother Banerji.

KNOX, J.—I also concur.

BLAIR, J.—I also concur.

BURKITT, J.—I am of the same opinion.

AIKMAN, J.—I also concur in the judgment of my brother Banerji.

Appeal decreed.

(1) (1881) I. L. R., 10 Cal., 1035. (2) (1885) I. L. R., 11 Cal., 718.
(3) (1889) I. L. R., 16 Cal., 152.

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April 3.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

ISHRI PRASAD SINGH (PLAINTIFF) *v.* LALLI JAS KUNWAR AND ANOTHER (DEFENDANTS).*

LALLI JAS KUNWAR AND ANOTHER (DEFENDANTS) *v.* ISHRI PRASAD SINGH (PLAINTIFF) *

Act No. 1 of 1872 (Indian Evidence Act,) sections 65 and 90—Presumption as to ancient documents—Destruction of original—Presumption applied to certified copy—Regulation No. LII of 1802, section 37—Disqualified proprietor—Procedure preliminary to taking estate under the Court of Wards—Procedure prescribed by the regulation to be strictly followed.

Held that the presumption allowed by section 90 of the Indian Evidence Act, 1872, may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available. *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno* (1) followed.

The procedure prescribed by Regulation No. LII of 1802 for disqualifying proprietors and taking their estates under the Court of Wards must be strictly followed in order that the disabilities incident to the status of a disqualified proprietor may ensue. *Mohammad Zahoor Ali Khan v. Mussumat Thakoorani Betta Koer* (2) referred to. It is incumbent therefore upon one seeking to dispute an adoption on the ground that the person making it was a "disqualified proprietor" to show that all the procedure necessary to make such person a disqualified proprietor was carried out according to law.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant in No. 127, respondent in No. 129.

Mr. *D. N. Banerji*, Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the respondents in No. 127, appellants in No. 129.

STRACHEY, C. J., and BANERJI, J.—The plaintiff in this case claiming to be the nearest reversioner to the estate of Thakur Chaturbhuj Singh, deceased, sues for declaratory relief in respect of certain acts done by Thakurain Mahtab Kunwar, widow of

* First Appeal Nos. 129 and 127 of 1898 from a decree of Maulvi Muhammad Mazhar Hasan, Subordinate Judge of Mainpuri, dated the 21st February 1898.

(1) (1879) 1 L. R., 5 Cal., 896, S. C. 6 (2) (1867) 11 Moo., I. A., 46 S. C. L. R., 199.

Chaturbhuj, by Lalli Jas Kunwar, his daughter, and by the second defendant Thakur Umro Singh. The acts complained of are:—

(1) a transfer made about the year 1850 by the widow Mahtab Kunwar of two villages belonging to the Kotla estate left by Chaturbhuj, namely, Ajaiapur Bakhauli and Ahmadpur Madha, in favour of her daughter, the defendant Lalli Jas Kunwar;

(2) a transfer made by Lalli Jas Kunwar on the 18th February, 1876, during the lifetime of Mahtab Kunwar, of the same two villages, in favour of Mohinder Kunwar, the deceased wife of the second defendant, who is in possession of them by inheritance from her;

(3) an entry obtained by Lalli Jas Kunwar after Mahtab Kunwar's death in April, 1880, of her name in the revenue records in respect of two other villages of the Kotla estate, namely, Khairgarh and Noner, upon the allegation that they formed part of her *stridhan*;

(4) a denial by the defendant in their written statements filed on the 23rd August, 1892, in a suit brought by the present plaintiff in the Court of the Subordinate Judge of Agra, of the plaintiff's title as next reversionary heir of Chaturbhuj to succeed to the Kotla estate as absolute owner after the death of Lalli Jas Kunwar.

The reliefs claimed by the plaintiff are:—

(1) A declaration that he is the next reversionary heir of Chaturbhuj Singh in respect of the whole Kotla estate.

(2) A declaration that the transfer by Mahtab Kunwar in favour of Lalli Jas Kunwar of Ajaiapur Bakhauli and Ahmadpur Madha was void and inoperative as against the plaintiff beyond the life-time of Lalli Jas Kunwar.

(3) A declaration that the four villages named in the plaint are not the *stridhan* of Lalli Jas Kunwar, and that she has no right to make a transfer of them beyond her life-interest.

The defendants raised various pleas, for the most part of a technical character, and to two of which it is unnecessary to refer. Their main pleas were (1) that the plaintiff was not the nearest reversionary heir of Chaturbhuj Singh, and was therefore not entitled to bring the suit; (2) that, in any event, the first prayer of the plaint for declaration of his reversionary title was

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not maintainable; (3) that the suit was barred by limitation; and (4) that the four villages named in the plaint formed part of the defendant Lalli Jas Kunwar's *stridhan*.

The Court below has held, first, that the first prayer of the plaint must be refused on the ground that no suit would lie for such a declaration as prayed therein; secondly, that the second prayer of the plaint was barred by Art. 125 of the second schedule of the Limitation Act, 1877; thirdly, that the villages Ajaiapur Rakhauri and Ahmadpur Madha were given to Lalli Jas Kunwar on her marriage as dowry, and therefore constitute her *stridhan* fourthly, that as regards all the properties left by Chaturbhuj Singh other than Ahmadpur Madha and Ajaiapur Rakhauri, the plaintiff was entitled to the declaration claimed in the third prayer of the plaint, namely, that Lalli Jas Kunwar had only a life-interest and not any alienable absolute interest. The rest of the claim was dismissed. From this decision both parties have appealed, and we have heard the two appeals together. First appeal No. 127 of 1898 is the appeal of the plaintiff. First appeal No. 129 of 1898 is the appeal of the defendants. Both appeals may be disposed of in one judgment.

As regards the first point, the Court below apparently holds that the plaintiff has, during the lifetime of Lalli Jas Kunwar, only a contingent interest as reversioner, and not a vested interest sufficient to support a suit for a declaration under section 42 of the Specific Relief Act, 1877. In support of this view the Subordinate Judge refers to *Hunsbuth Kerain v. Ishri Dut Koer* (1) and *Greeman Singh v. Wahari Lall Singh* (2). In the view which we take of the case, it is not necessary for us to decide or discuss this point. It is difficult to say upon what grounds the Subordinate Judge has made the declaration contained in the decree as to the villages left by Chaturbhuj Singh other than those mentioned in the plaint. It is clear from the plaint that those other villages were only included in the suit in reference to the first prayer which the Court below has disallowed. No cause of action is disclosed by the plaint in reference to those other villages either as regards the alienations mentioned in

(1) (1879) I. L. R., 5, Calc., 512, S. C. 4 (2) (1881) I. L. R., 8 Calc., 12, C. L. R., 511.

paragraphs (4) and (6) (as to which the suit had been dismissed as time-barred), or as regards the allegation as to *stridhan*, the plaintiff not alleging that Lalli Jas Kunwar ever claimed as her *stridhan* any villages besides the villages named in the plaint or in paragraph (18) of the written statement. Upon the view taken by the Subordinate Judge it appears to us that he ought to have dismissed the suit, except to the extent of a declaration that the villages Khairgarh and Noner were not the *stridhan* of Lalli Jas Kunwar.

In the argument of these appeals, as in the Court below, the main question discussed has been whether the plaintiff is the nearest reversioner to the estate of Chaturbhuj Singh so as to entitle him to maintain a declaratory suit impeaching the acts of the widow and the daughter. There can be no question, having regard to the rulings of their Lordships of the Privy Council, that if he cannot show this the whole suit must fail. In the plaint he claims that he stands in that relation to Chaturbhuj Singh by virtue of two adoptions,—first, an adoption of his father Har Narain Singh, secondly, an adoption of Chaturbhuj Singh himself. He further contends that, even if neither of these adoptions is held proved, he is still, with reference to the genealogical table annexed to the plaint, the nearest reversioner to the estate of Chaturbhuj Singh.

In reply to the suit, the defendants in their written statements deny both adoptions, deny the genealogical table asserted by the plaintiff, and set up a different genealogical table of their own. It is, of course, for the plaintiff to prove the adoptions and the genealogical table upon which his title to sue as nearest reversioner is based.

To explain the plaintiff's case as to the relation in which he stands to Chaturbhuj Singh, we may for the present assume the correctness of the genealogical table found to be correct by the Subordinate Judge, and printed in his judgment at page 45 of the paper book, and which does not entirely adopt either the pedigree set up by the plaintiff or that set up by the defendants. According to the plaintiff, Chaturbhuj Singh, who was the son of Bhup Singh in Markishen Das' branch of the family, was adopted to Sundar Singh in the branch of Raja Kam, brother of

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Harkishen Das, by Sundar Singh's widow, At Kunwar, about the year 1831. He further alleges that his own father, Har Narain Singh, also in the branch of Harkishen Das, was adopted to Bhagwan Singh, a member of Raja Ram's branch, by Bhagwan Singh's widow, Dhan Kunwar, in 1829. If both these adoptions are proved, the result would be to make Chaturbhuj Singh and Har Narain Singh, the grandson and great-grandson respectively of two brothers Kishen Singh and Jawahir Singh, grandsons of Raja Ram, brother of Harkishen Das. As there are admittedly no other persons living who are descended from Kishen Singh or Jawahir Singh it follows that the plaintiff, as the son of Har Narain Singh, would be the nearest reversioner to Chaturbhuj Singh, whose widow, Mahtab Kunwar, made the alienation first complained of in the plaint, and whose daughter, the first defendant, Lalli Jas Kunwar, is in possession of the bulk of the estate. As already stated, however, the plaintiff further contends that even if neither adoption is proved, there would still be no nearer reversioner than himself to Chaturbhuj Singh, and that, therefore, his declaratory suit would still be maintainable. He seeks to prove this by the genealogical table annexed to the plaint. One of the respects in which that table differs from the table accepted as correct by the Subordinate Judge is that the plaintiff denies that Pahar Singh was a son of Harkishen Das, and consequently denies the relationship of Chaturbhuj Singh of all the descendants of Pahar Singh. If, as the defendants contend, and as the Subordinate Judge finds, Pahar Singh was a son of Harkishen Das, then admittedly there are several persons who would be nearer reversioners than the plaintiff to Chaturbhuj Singh; for instance, the grandsons of Arjun Singh, son of Pahar Singh, and the second defendant Umrao Singh, who is the great-grandson of Pahar Singh's son Madho Singh.

The defendants contend that Har Narain was descended, not as alleged by the plaintiff, from Mandhata, a son of Harkishen Das, but from Sartaj Singh, an uncle of Harkishen Das, and that Mandhata died childless. The result of that would be that the plaintiff would be much more distantly related to Chaturbhuj Singh than several other persons. We need only say that the Court below has found that Har Narain was, as the plaintiff

asserts, descended from Mandhata, and that as to this we see no reason to disagree with the decision which has hardly been disputed in the appeal before us. The defendants also contend that Harkishen Das had a brother Hansram, whose descendant would also be nearer to Chaturbhuj Singh than the plaintiff. In the view which we take of the case, it is not necessary for us to decide that point.

The result of these opposing contentions may be shortly stated thus. If the plaintiff succeeds in proving both the adoptions alleged by him, he establishes his position as the nearest reversioner to Chaturbhuj Singh. If he proves the adoption of Har Narain Singh only, the suit must fail, as in that case the plaintiff, having passed by reason of the adoption out of Harkishen's branch into that of Raja Ram, would not be the nearest reversioner to Chaturbhuj Singh in the presence of other persons admittedly living in the branch of Harkishen Das himself to which Chaturbhuj belonged. If the plaintiff proves the adoption of Chaturbhuj only, he can only succeed if Pahar Singh was not a son of Harkishen Das, for, if he was, then, as stated above, several of the descendants of Pahar Singh would be nearer to Chaturbhuj Singh than the plaintiff. If the plaintiff proves neither of the adoptions, then he can only succeed by proving that Pahar Singh was not a son of Harkishen Das.

We will consider in turn each of the two alleged adoptions---and first that of Har Narain Singh. The Subordinate Judge, after a very full statement of the evidence bearing on that adoption, came to the conclusion that it was proved to have taken place in fact, and also that it was a valid adoption in law. So far as the fact of the adoption is concerned, we have arrived at the conclusion that we ought not to dissent from the Subordinate Judge's finding, which is confirmed by materials which were not before the Court below. The earliest documents bearing on the question are a group of three purporting to date from about the time of adoption itself. The first is an agreement purporting to be executed by Dhan Kunwar, and bearing her seal, on the 2nd December, 1829. It states that she has for the preservation of the estate adopted as her son Har Narain, son of Sarup Singh, and adds that the document has been written by way of an

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agreement and of a deed of adoption. The second is a document, dated 3rd December, 1829, by which Sarup Singh, the natural father of Har Narain Singh, states that he has of his own accord given his son Har Narain Singh to Dhan Kunwar, and that she of her own free will adopted the said son as her own, and made him a substitute for a real son in connection with the estate of her deceased husband. The third is an agreement, dated the 11th December, 1829, purporting to be executed by Ganga Kunwar, widow of a cousin of Bhagwan Singh, the husband of Dhan Kunwar, setting forth the adoption of Har Narain Singh, and stating in substance that she also has put Har Narain Singh in possession of the entire estate in her possession and made him owner thereof. The two first documents bear the seal of a Kazi, and the attestations of numerous witnesses, zamindars and others. All three documents obviously are of great age, and it has not been disputed that they were produced from proper custody. Apart from the general evidence contesting the adoption of Har Narain Singh, no serious argument was addressed to us to show that these documents were not genuine. We agree with the Subordinate Judge in accepting them as genuine, and we base this conclusion partly on the absence of suspicious circumstances in the documents themselves, and partly on the corroboration which, in our opinion, they derive from other documents to which we shall presently refer. The first piece of corroborative evidence is an order passed by the Collector of the Shahabad District, on the 3rd December, 1829, that is, on the day following that on which the instrument executed by Dhan Kunwar purports to have been made. The order recites that Dhan Kunwar, widow of Thakur Bhagwan Singh, intends to adopt the son of Thakur Sarup Singh, and that as the *ilaka* is, by sanction of the Commissioner, under the Court of Wards, she had, under section 37 of Regulation No. LII of 1803, no authority to make the adoption without the sanction of the Court of Wards. The order goes on to direct that a copy of the proceedings should be sent to the Magistrate of the Etawah District, in which the lady lived, asking him to "prevent the said Musammat from adopting the son of the Thakur aforesaid; that a *parwana* be sent to the Thakurain aforesaid containing the aforesaid particulars; and

"that a parwana be sent also to Maulvi Muhammad Azam, Kazi of "pargana Ferozabad, preventing him from affixing the seal to the "*Libanama* (deed of gift, &c.) at the request of the aforesaid "Musammat." At the hearing of the appeal we admitted this document in evidence on the application of the defendants, under section 53 of the Code for the reasons stated in our order of admission. What authority the Collector had to ask the Magistrate to prevent the adoption, or to forbid the Kazi to affix the seal, it would be difficult to say, and it is unnecessary to discuss. The Collector is an Officer of the Court of Wards, would no doubt consider it his official duty to warn Dhan Kunwar against making an adoption without the sanction of the Court of Wards, which he believed to be required. The document is of importance in showing that the Collector then treated Dhan Kunwar as contemplating the immediate adoption of Har Narain Singh. There is on the record a document, dated 13th December, 1829, described as "application of Jugul Kishore, "Sazawal, Ishail Narahi, etc.", upon which there is an order dated the 17th December, 1829, by the Collector, directing that a letter be written to the members of the Court of Wards. The report sets forth, upon hearsay information, that Dhan Kunwar had adopted a boy whose description obviously answers to Har Narain Singh, but we have discarded the document as evidence of the facts therein stated, partly because the information is merely hearsay and partly because there is nothing to show that the report was made by the Sazawal in the execution of any official duty, but we think it may be referred to as explaining the official order of the Collector, which shows that the Collector on the 17th December, 1829, reported to the Court of Wards, who would be interested in any such adoption, information to the effect that it had actually taken place. At the hearing of the appeals we also admitted in evidence, for reasons stated in our order of admission, an order of the Collector, dated 3rd July, 1830. This is described as a "Precept to Thakur Sarup Singh, "ancestor of Har Narain Singh, adopted son of Musammat Dhan "Kunwar, zamindar of Kejri, pargana Ferozabad." The order reminds Sarup Singh (who, it will be remembered, was the natural father of Har Narain Singh), that at the time when Dhan

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Kunwar adopted Har Narain Singh and made a gift of her zamindari property in his favour, an agreement had been made with Surup Singh for the satisfaction of debts due to creditors. It calls upon him to submit an explanation showing why he had not performed the promise on which he had given his son in adoption to the said Musammat. We have also admitted in evidence, under section 568 of the Code, an official letter addressed by the Commissioner of the Agra Division to the Sadr Board of Revenue, dated the 16th of February, 1831, to which we shall more fully refer presently. In that report Har Narain is referred to as the boy "whom the Thakurain had adopted "without authority and consequently illegally, after the estate "had been taken under the Court of Wards." Lastly, there is a petition by Dhan Kunwar to the Collector of Pharah, dated the 28th September, 1831, dealing principally with her disputes with Sumar Singh—disputes to which we need not at present more particularly refer. In that petition Musammat Dhan Kunwar sets forth that she had adopted Har Narain Singh from Sarup Singh "in 1829 by going through the adoption ceremonies "according to Hindu law". To this extent we think that the statements in the petition may be accepted as true, more especially as the petition refers to official applications and proceedings in which the adoption was asserted, which, owing to lapse of time and destruction of records during the Mutiny, are not now forthcoming, but which Dhan Kunwar in 1829 would hardly have ventured to refer to if they had not been in existence. On behalf of the defendants it was objected that this document was not properly proved to have been executed by Dhan Kunwar. The document is a certified copy purporting to be a copy of an original petition of Dhan Kunwar, dated the 28th September, 1831. The copy purports to have been granted on the 20th October, 1831. It was filed in the Court below on behalf of the plaintiff. It is common knowledge, of which we are entitled to take notice, that the original records of the Agra Division were destroyed during the mutiny of 1857, and therefore under section 56, cl. (c) of the Indian Evidence Act, the copy is admissible as secondary evidence of the original. Under section 90 we may presume that the document was duly executed by Musammat

Dhan Kunwar. To this it has been objected that section 90 does not apply so as to warrant the presumption in question, where the original document is not produced in Court, and in support of this argument great stress is laid upon the word "produced" in the section. In *Khetter Chunder Mookerjee v. Khetter Pund Sanyal & Co* (1) Mr. Justice Wilson applied the presumption of section 90 to a copy of a document which had been lost and was more than 30 years old, and in reference to the argument based on the word "produced," said: "I do not think the use of these words limits the operation of the section to cases in which the document is actually 'produced in Court'." Although the matter is not free from doubt, we think that we should follow this ruling, and under section 90 of the Evidence Act, presume the genuineness of the petition of Musammat Dhan Kunwar. We have excluded from consideration a document referred to by the Subordinate Judge, which purports to be a written statement, dated the 5th of November, 1885, filed by Har Narain Singh as defendant in a suit brought in the Court of the Munsif of Azam, by one Parasram Singh against Mahab Kunwar, Har Narain Singh and others. This written statement has not been proved to our satisfaction as a written statement made by the Har Narain Singh whose adoption is in question in this case.

The documents which we have just considered strongly corroborate the documents of 1820 in regard to the adoption of Har Narain Singh, and satisfy us that he was in fact adopted by Dhan Kunwar in December, 1820. The next question to be considered is whether that adoption was a valid adoption in law. This question has been discussed from two different points of view. In the first place, it was contended on behalf of the defendants that at the time of the alleged adoption, the estate left by Bhagwan Singh was under the management of the Court of Wards; that by section 37 of Regulation No. LVI of 1803, it was enacted that "no adoption by disqualified landholders shall be deemed valid without the previous consent of the Court of Wards, on application made to them through the Collector"; and that inasmuch as there is no evidence of any sanction having

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(1) (1879) L. L. R., 5 Cal., 1886; S. C. G. C. 1, B., 193.

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been given by the Court of Wards to the adoption of Har Narain Singh by Dhan Kunwar (who, it is contended, was a "disqualified landholder" within the meaning of the Regulation), that adoption, if it took place, was invalid. The Court of Wards spoken of in section 37 is shown by section 2 to be the Board of Revenue. Now in regard to this argument, we are satisfied that at the time of the adoption the estate then held by Dhan Kunwar was, as a matter of fact, in the possession of the Court of Wards. We think this is the only possible inference from the Collector, Mr. Deeds' orders of the 3rd and 17th December, 1829, from his precept to Sarup Singh of the 3rd July, 1830, and from the Commissioner's letter to the Board of Revenue of the 16th February, 1831. The same official documents further show, in our opinion, that the adoption was not sanctioned by the Board of Revenue. But the further question arises whether the possession and management of the estate was not only in fact, but also in accordance with law, assumed by the Court of Wards. Unless that question is answered in the affirmative, section 37 of the Regulation would not apply, and the adoption would not be invalidated by the absence of such sanction. Now the legal requisites of an assumption by the Court of Wards of the possession and management of an estate are set forth in the Regulation. The landholder must be a "disqualified landholder" within the meaning of section 3, and under sections 8 and 9, where the landholder is a female, the procedure prescribed is for the Board of Revenue, upon the report of the Collector, to take the estate under their care, and to report the circumstance to the Governor-General in Council, to whom the power is reserved of exempting any female proprietor from the operation of the Regulation. In *Mohammud Zakoar Ali Khan v. Mussamat Thakooranee Rutta Koer* (1) decided under the Regulation, their Lordships of the Privy Council held that "the provisions of such a law should be strictly pursued in order to effect the disqualification of any particular person," and that it must not be assumed that a female proprietor was necessarily a disqualified person from the estate being in fact under the charge of the Court of Wards. They added, "under this Regulation the Collector is to report a

(1) (1867) 11 Moo., I. A., 468.

“female proprietor as disqualified to the Board of Revenue, and
 “the Board of Revenue, in their capacity of a Court of Wards,
 “are to report that they have taken the estate under their charge
 “to the Governor-General in Council, so as to enable him to
 “exercise his discretion of exempting her from the operation of
 “the Regulation. Nor are these mere forms. They are necessary
 “preliminaries to the disqualification of a female”. Their Lord-
 ships comment on the fact that the decisions of the Courts below
 were based exclusively on the ground that the estate was in the
 custody of the Court of Wards, and that “the question whether
 “any formal report was ever made of Ratan Koer being a dis-
 “qualified female was left wholly unnoticed.” In that case their
 Lordships agreed with the Courts below in finding that, except
 for the period of the Mutiny, the Court of Wards was conti-
 nuously in the actual possession of the estate from the year
 1811 to August, 1862. We think that it follows from this
 decision that it rests upon one seeking to invalidate an adop-
 tion by reason of the provisions of section 37 to give strict
 proof, not only that the estate was in the actual possession of the
 Court of Wards, but that the necessary legal preliminaries
 to the disqualification of the female proprietor had regularly
 taken place. Now upon this point the letter of the Board of
 Revenue to the Commissioner of the Agra Division, dated the 1st
 March, 1881, is of the utmost importance. In that letter the
 Board state, “as the property has been managed for 10 years by the
 “Thakurain, and it was not proposed to place it under the Court
 “of Wards until her affairs had fallen into such a state of confu-
 “sion as to render it improbable that the interference of the Court
 “could be productive of any good effect, the Board consider the
 “order passed by the late Commissioner, under date the 25th June,
 “1829, to have been both injudicious and irregular,—injudicious
 “for the reasons above stated, and irregular inasmuch as the Com-
 “missioner was not competent of his own authority to place the
 “estate under the management of the Court of Wards.” Again :
 “Under all circumstances it appears to the Board that any fur-
 “ther interference in the affairs of the estate by the officers of
 “Government ought to be carefully avoided, and that the order of
 “the late Commissioner should be considered of no effect, as having

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"been issued without due authority." That statement made by the Board of Revenue—the Court of Wards itself—shows that the estate was taken under the management of the Court of Wards irregularly and without proper authority, and in disregard of the provisions of the Regulation which the Privy Council held must be strictly pursued. Against this it has been contended on behalf of the defendants that notwithstanding this statement, the Commissioner had, independently of the Board of Revenue, authority to take the estate under the management of the Court of Wards. That contention is based upon the provisions of Regulation I of 1829, constituting Commissioners of Revenue in certain specified divisions, including Shrahabad, and upon section 4, which provides that "the said Commissioners shall, until otherwise specifically provided by law, possess and exercise within the several districts comprised in their respective divisions, the powers and authority now vested in the Board of Revenue and Court of Wards, subject to the control and direction of a Sadr or Head Board to be ordinarily stationed at the Presidency, unless otherwise directed by the Governor-General in Council, and to such restrictions and provisions as the Governor-General in Council or the said Board with his authority or sanction may prescribe." That section expressly reserves the control and direction of the Board of Revenue as Court of Wards, and subjects the action of the Commissioners to restrictions and provisions prescribed by the Board of Revenue. The letter of the Board to which we have just referred is an explicit statement by the controlling authority that the Commissioner ought not to have taken the estate under management without reference to them, and that such taking over was in fact contrary to their intention. It is impossible after the lapse of so many years to ascertain what were the directions prescribed by the Sadr Board of Revenue to its subordinate in connection with estates under the Court of Wards. But it must, we think, be presumed that the Board, in 1831, correctly interpreted the relation in which it stood to the Commissioner, and had sufficient grounds for condemning as it did the assumption of the management of Dhan Kunwar's estate as unauthorized and illegal. At all events so much doubt is thrown

upon the matter that, particularly in the absence of further evidence as to the circumstances in which the Commissioner acted, we think it impossible to hold that the proof required by the Privy Council in such matters has been given in this case. That being so, the defendants have, in our opinion, failed to establish that the adoption of Har Narain Singh was invalid by reason of the provisions of section 37 of Regulation LII of 1503, and it is unnecessary for us to consider the argument addressed to us by Pandit Moti Lal as to the construction and effect of that section assuming it to apply. So far therefore as the Court of Wards is concerned, we see no reason to doubt the validity of the adoption of Har Narain Singh by Dhan Kunwar in 1829.

[Only so much of the judgment is here printed as deals with the points referred to in the head note. After discussing several other questions raised in the appeal, their Lordships finally dismissed the plaintiff's suit, holding that he had failed to establish the position necessary for his success.—Ed.]

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Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji.

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Act No. IX of 1872 (Indian Contract Act), section 43—Joint contract—Right of promisee to sue any or all of the joint promisors—Right of joint promisors to be joined as defendants—Decree against some only of several joint promisors—Effects of such decree—Civil Procedure Code, section 29—Hindu law—Joint Hindu family—Position of managing member—Suit against managing member—Subsequent suit against other members.

The effect of section 43 of the Indian Contract Act, 1872, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in the cases of *King v Hoare* (1), and *Kendall v. Hamilton* (2) is no longer applicable to cases arising in India, at all events in the Mufassil, since the passing of that Act, and a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors *King v. Hoare* (1), *Kendall v. Hamilton* (2), *In re Hodgson* (3), *Hammond v. Schofield* (4), *Nulhoo Lall Chowdhry v. Shoukie Lall* (5), *Himendro Coomarr Mullick v. Rajendrolall Moonshee* (6), *Gurusami Chetti v. Samurti Chinna Mannar Chetti* (7), *Lukmadas Khumji v. Purshotam Haridas* (8), *Rahmubhoy Hubibbhoy v. Turner*

* First Appeal No. 177 of 1897 from a decree of Babu Nilmadhab Ray, Subordinate Judge of Benares, dated the 20th of May 1897.

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| (1) () 13 M. and W., 494. | (5) (1872) 10 B. L. R., 200; S. C. 18 W. R., 465 |
| (2) () L. R., 4 A. & C., 501. | (6) (1878) I. L. R., 3 Calc., 353. |
| (3) () L. R., 31 Ch. D., 177. | (7) (1881) I. L. R., 5 Mad., 37. |
| (4) (1891) L. Q. B., 453. | (8) (1882) I. L. R., 6 Bom., 700. |

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(1), *Chockalinga Mudali v. Subbaraya Mudali* (2), *Narayana Chetti v. Lakshmana Chetti* (3), *Sitanath Koer v. Land Mortgage Bank of India* (4), *Nobra Chandra Roy v. Magantara Dassya* (5), *Roy Lutchniput Singh Bahadur v. The Land Mortgage Bank of India* (6), *Radha Pershad Singh Bahadur v. Ramkhelawan Singh* (7), *Bhukandas Vijbhukandas v. Lallubhai Kashidas* (8), *Laksmishankar Devshankarm v. Vishnuram* (9), *Dharam Singh v. Angan Lal* (10), *Motilal Bichardass v. Ghellabhai Hariram* (11), *Brinsmead v. Harrison* (12), *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.* (13), *Robinson v. Geisell* (14), *Balmakund v. Sangari* (15), *Priestley v. Fernie* (16), *Bir Bhaddar Sevak Pande v. Sirju Prasad* (17), *Bhawani Pershad v. Kallu* (18), *Dhanput Singh v. Sham Soonder Mitter* (19), referred to.

The managing member of a Hindu joint family holds a position in relation to the other members of the family and the family property peculiar to himself and not precisely analogous to anything known to English law. He is not the agent of the other members of the family.

The plaintiff sued B and M, alleged to be the managing members of a joint Hindu family, for sale upon four mortgages executed by them in respect of property owned by the joint family and obtained a decree in 1894. He brought the present suit against defendant Nos. 1 to 15, other members of the same family, said to be the brothers, brother's sons and cousins of B and M, claiming enforcement of the same mortgages against the said defendants by sale of their interests in the mortgaged property. *Held*, that the cause of action against the defendants Nos. 1 to 15 on the mortgages in suit was not merged in the decree of 1894, and that the suit against them is not barred.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Messrs. *T. Conlan* and *Karamat Husain* for the appellant.

Mr. *Abdul Majid* for the respondents.

STRACHEY, C. J.—This appeal raises an important question, never yet decided, whether the doctrine of *King v. Hoare* (20), and *Kendall v. Hamilton* (21) as to the effect of a judgment on a joint contract upon a subsequent suit against co-contractors who were not parties to the former suit, should be applied in these Provinces, notwithstanding section 43 of the Indian Contract Act, 1872.

The suit was a suit for sale on four mortgages executed in 1886, 1888, 1889 and 1890, and was brought against seventeen persons who are admittedly members of a joint Hindu family. In the plaint the plaintiff alleges that the defendants Nos. 16 and 17, Budh Ram Singh and Mahabir Singh, who are *pro formé*

(1) (1890) I. L. R., 14 Bom., 408.

(2) (1882) I. L. R., 5 Mad., 133.

(3) (1897) I. L. R., 21 Mad., 256.

(4) (1883) I. L. R., 9 Calc., 888.

(5) (1884) I. L. R., 10 Calc., 924.

(6) (1886) I. L. R., 14 Calc., 460, note.

(7) (1895) I. L. R., 23 Calc., 302.

(8) (1892) I. L. R., 17 Bom., 562.

(9) (1896) I. L. R., 24 Bom., 77.

(10) (1899) I. L. R., 21 All., 301.

(11) (1892) I. L. R., 17 Bom., 6.

(12) () I. L. R., 7 C. P., 547.

(13) (1893) 1 Q. B., 422.

(14) (1894) 2 Q. B., 685.

(15) (1897) I. L. R., 19 All., 379.

(16) () 3 H. and C., 977.

(17) (1887) I. L. R., 9 All., 631.

(18) (1895) I. L. R., 17 All., 537.

(19) (1879) I. L. R., 5 Calc., 201.

(20) () 13 M. and W., 494.

(21) () I. L. R., 4 A. C., 504.

defendants only, were the managers of the joint family carrying on its business, and that as such managers and for the purpose of meeting necessary family expenses, these defendants borrowed money from the plaintiff's father and the plaintiff himself on the security of the mortgages in suit, which are mortgages of shares in zemindari property owned and possessed by the joint family. On these mortgages, which were executed by the defendants Nos. 16 and 17 in their own names, the plaintiff formerly sued the defendants only, and obtained a decree for sale for Rs. 12,857-1-3, which became final on the 5th May 1891. In execution of the decree the mortgaged property was advertised for sale. Thereupon the defendants Nos. 1 to 15 brought a suit against the decree-holder for a declaration that, as they had not been made parties to the first suit, as they should have been with reference to section 85 of the Transfer of Property Act, 1882, they were not affected by the decree, and their interests in the family property could not be sold in execution of it. The Court trying that suit gave the declaration prayed for, on the authority of the decision of the Full Bench in *Bhawni Prasad v. Kallu* (1). Thereupon the plaintiff brought the present suit, claiming enforcement of the mortgages against the defendants Nos. 1 to 15 by sale of their interests. According to the pedigree annexed to the plaint, these defendants are brothers, brother's sons and cousins of Budh Ram Singh and Mahabir Singh. In defence the defendants raised various pleas, in which they denied that Budh Ram Singh and Mahabir Singh were managers of the joint family and that the loans were taken for purposes binding on the family, and other contentions to which it is unnecessary to refer. The Court below has dismissed the suit on a preliminary point of law. It has held in effect that by the decree of the 5th May, 1891, against two only of the persons alleged to be jointly liable under the mortgages, the whole cause of action in the case of each mortgage was merged and could not be made the subject of a fresh suit against joint debtors not parties to the suit in which the decree was passed. The Subordinate Judge in his judgment says that he therefore dismisses the suit as barred by section 43 of the Code of Civil Procedure. The reference to that section is an obvious mistake, as section 43

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of the Code applies only where the former suit was between the same parties or between parties under whom the parties to the subsequent suit claim. *Dabnulat v. Sangari* (1). I think, however, that the reference to section 13 of the Code is a mere slip, as the judgment is expressly based on the decision in *Nuthoo Lall Chowdhry v. Shoukee Lall* (2), which proceeded, not on the principle of splitting claim, now embodied in section 43 of the Code, but on the principle of *King v. Hoare* (3). The question is whether, having regard to that principle and to the provisions of section 43 of the Contract Act, the principle is applicable to cases of joint liability in this country.

The case of *Nuthoo Lall Chowdhry v. Shoukee Lall* (2) was decided before the Contract Act came into force. Since then it has been held that, notwithstanding section 43 of the Contract Act, the doctrine of *King v. Hoare* (3) should be applied to cases arising in the Presidency towns: *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (4), *Gurusann Chetti v. Sannuti Chinna Munnai Chetti* (5), *Lukmalas Khimji v. Purshotam Haridas* (6) and *Rahmubhoy Hubbbhoy v. Turner* (7), which, however, related not to joint contractors but to joint wrong-doers, to whom of course section 13 has no application. In *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (4) Mr. Justice Mackay's judgment appears to have proceeded partly on the fact that the case was one arising in the High Court's original jurisdiction and was governed by English law. In the other High Courts it has often been assumed, though never formally decided after argument, that the doctrine of *King v. Hoare* (3) would also be applicable in the Mufassil: *Chockalingu Mudali v. Subbaraya Mudali* (8), *Narayana Chetti v. Lakshmana Chetti* (9), *Sitanath Koer v. Land Mortgage Bank of India* (10), *Nobin Chandra Roy v. Maganbura Dassya* (11), *Roy Lutchniput Singh Bahadur v. The Land Mortgage Bank of India* (12), *Radha Pershad Singh Bahadur v. Ramkhetawan Singh* (13), *Bhukhandas Vijbhau*

- (1) (1897) I. L. R., 19 All., 379. (7) (1890) I. L. R., 14 Bom., 408.
 (2) (1872) 10 B. L. R., 200; S. C. 18 (8) (1882) I. L. R., 5 Mad., 133, at p. 135.
 W. R., 458. (9) (1897) I. L. R., 21 Mad., 256.
 (3) (1844) 13 M. & W., 494. (10) (1883) I. L. R., 9 Cal., 888.
 (4) (1878) I. L. R., 3 Cal., 353. (11) (1884) I. L. R., 10 Cal., 924.
 (5) (1881) I. L. R., 5 Mad., 37. (12) (1886) I. L. R., 14 Cal., 469, note.
 (6) (1882) I. L. R., 6 Bom., 700. (13) (1895) I. L. R., 23 Cal., 502.

London v. Lallubhai Kashibhai (1) and *London v. Moolchand or v. Vishnubhai* (2), and also so as to be applied against joint obligors. In the latter case, however, it does not appear to have been ruled upon in *Dharam Singh and others v. Lall* (3), where, however, it is not decided, as it was held that the liability there could not be treated as a joint liability. In two at least of the above-mentioned British cases expressed as to whether it is desirable to extend the doctrine of *King v. Horne* (4) to India, at all events to cases in the Mofussil. Such doubts were expressed by Mr. Justice Mackay in *Hemant Chunder Mullick v. Rajendraball Mohandas* (5), where, however, the learned Judge was strongly inclined to saying that the doctrine has been repudiated in America. See *Dietsch v. Dietsch* (6) and *Estoppel*, 15th edition, pp. 161 to 166, and *Wentworth v. The Earl of Essex* and *A. G. v. Jackson*, pp. 1661 to 1663, cited by Mr. Justice Mackay in *Gaurisarni Chetti v. S. Sarnath Chetti and Moolnar Chetti* (6). The conclusion at which I have arrived is that the doctrine of *King v. Horne* (1) is not applicable in India, at all events in the Mofussil, and since the passing of the Indian Contract Act. This conclusion, however, is not the logical flow of the doctrine as merely technical cases or a legal question. That is a question of public policy, and it is a question of public policy which should be governed, and not by the doctrine of public policy as merely technical cases. It was expressed by the majority of the Law Lords in *Kendall v. Hamilton* (7) and by Lord Justice Bowen in *re Holgson* (8), that the rule was not a merely technical one, but was based on considerations of public policy relating to the protection of joint debtors. So far as general expediency or public policy is concerned, considerations of the importance, on the one hand, of checking undue multiplicity of suits, and, on the other hand, of compelling people to pay their debts, are, in India at least, fairly evenly balanced. My objections to the application of the doctrine are based on purely legal grounds. The doctrine now rests not so much on *King v. Horne* (1) as on the judgment of the Law Lords in *Kendall v. Hamilton* (7). A.

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(1) (1892) L. L. R., 17 Bom., 692. (2) (1878) L. L. R., 3 Cal., 273.

(3) (1879) L. L. R., 21 Bom., 77. (4) (1831) L. L. R., 5 Mad., 27.

(5) (1879) L. L. R., 21 Bom., 304. (7) (1879) L. L. R., 3 Cal., 273.

(6) (1879) L. L. R., 21 Bom., 304. (8) (1879) L. L. R., 3 Cal., 273.

(7) (1879) L. L. R., 21 Bom., 304.

(8) (1879) L. L. R., 3 Cal., 273.

Chandras v. Zaidulhaid Kashiidas (1) and *L. Kashish v. L. Choudhary v. Vishwanam* (2), several of these relate to suits against joint obligors. In *Pr. Choudhary* the question does not appear to have been raised except in *Chandras Singh v. L. Choudhary* (3), where, however, it was not decided, as it was held that the liability of the joint obligors was not a joint liability. The doctrine of discharge as much doubt has been expressed as to whether it is desirable to extend the doctrine of *King v. Hoare* (4) to India, at all events to cases in the Mufassil. Such doubts were expressed by Sir Justice Mansby in *Hemant Choudhary Mohd. v. Rajamohd. Mohd. v. Mohd.* (5), where, however, the learned Judge was clearly mistaken in saying that the doctrine has been resuscitated in America. See Digby on the Law of Estoppel, 2nd Edn., pp. 101 to 110; cf. Walker on the Law of Foreign Jurisdiction, pp. 120 to 123, and also by Sir Justice Prasad Ayyar in *Gurnam Chetti v. S. Ram Chetti* (6). The conclusion at which I have arrived is that the doctrine of *King v. Hoare* (4) is not applicable in India, at all events in the Mufassil, and since the passing of the Indian Contract Act. This conclusion, however, is not based on any view of the doctrine as a merely technical one, or as being inequitable or unjust. That is a question which many learned Judges have expressed considerable doubts as to whether we should give any particular consideration. It was expressed by the majority of the Law Lords in *Kendall v. Hamilton* (7) and also by Sir Justice Bowen in *Three Holyons* (8), that the rule was not a merely technical one, but was based on considerations of public policy relating to the protection of joint debtors. So far as general expediency or public policy is concerned, considerations of the importance, on the one hand, of checking undue multiplicity of suits, and, on the other hand, of compelling people to pay their debts, are, in India at least, fairly evenly balanced. My objections to the application of the doctrine are based on purely legal grounds. The doctrine now rests not so much on *King v. Hoare* (4) as on the judgment of the Law Lords in *Kendall v. Hamilton* (7). As

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(1) (1892) I. L. R., 17 Bom., 532. (2) (1878) I. L. R., 3 Cal., 33.
(3) (1899) I. L. R., 21 Bom., 77. (4) (1891) I. L. R., 6 Mad., 27.
(5) (1912) I. L. R., 21 Cal., 301. (7) (1879) L. R., 4 A. C. 613.
(6) (1914) 13 M. L. J., 191. (8) (1885) L. R., 31 Ch. D., 74, p. 188.

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Justice Bowen in *In re Hoolyson* (1) at p. 183 of the report. The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of *King v. Hoare* (2). There is in the cases of joint contract and joint debt as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, it is for the same cause of action—there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that whether or no the rule by the light of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognized by the law. In order to protect each of the joint debtors the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors, not only as against him but as against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued, if he were left with future litigation still hanging over his head. All his liability is merged therefore in the judgment, the old debt disappears and the judgment is left in its place. That is the legal view which has been laid in *King v. Hoare* (2), and that was the real ground of the decision in *Kendall v. Hamilton* (3). Again in *Hammond v. Schofield* (4) Vaughan Williams, J., said:—"It seems also to be well settled by a series of

(1) (1885) L. R. 31 Ch. D., 177.

(2) (1844) 13 M. and W., 494.

(3) (1879) L. R., 4 A. C., 504.

(4) (1891) 1 Q. B., 453 at p. 457.

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“one or more of such joint promisors to perform the whole or the part of the promise.” The result is, first, that the doctrine of *King v. Hoare* (1) and *Kendall v. Hamilton* (3) depends on the ordinary right possessed by a joint contractor in England to have all the co-contractors joined as defendants in a suit on the joint obligation; secondly, that the rule is not applicable where the liability sought to be enforced is joint and several. That being so, how does the matter stand in India? Section 13 of the Contract Act provides:—

“When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole or the promise.” Illustration (a) is as follows:—“A, B and C jointly promise to pay D Rs. 3,000. D may compel either A or B

The authorities also show that where the obligation is not joint but joint and several the doctrine of merger does not apply, and a judgment against one of the debtors without satisfaction is not a bar to a suit against the others. See *King v. Hoare* (1) and the cases cited in Leake on Contract, p. 808, Bullen and Leake p. 751, and *Dhunpat Singh v. Shree Swarnkar Mitter* (2). In *Kendall v. Hamilton* (3) the appellant unsuccessfully contended that as the debt sued on was a partnership debt, the doctrine of *King v. Hoare* (1) did not apply, as in equity all partnership debts were joint and several. Under order 16, Rule 6 of the Rules under the Judicature Act, which is identical with section 27 of the Code of Civil Procedure, the plaintiff may at his option join as parties to the same suit all or any of the persons severally or jointly and severally liable on any one contract.

The result is, first, that the doctrine of *King v. Hoare* (1) and *Kendall v. Hamilton* (3) depends on the ordinary right possessed by a joint contractor in England to have all the co-contractors joined as defendants in a suit on the joint obligation; secondly, that the rule is not applicable where the liability sought to be enforced is joint and several. That being so, how does the matter stand in India? Section 13 of the Contract Act provides:—

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(1) (1844) 13 M. and W. 494. (2) (1879) 1 L. R., 5 Cal., 291.
(3) (1879) L. R., 4 A. C., 504.

"or C to pay him Rs. 3,000." This is a clear departure from the English law, and in my opinion excludes the right of a joint contractor to be sued along with his co-contractors. That this is the effect of section 43 is clearly recognised by several decisions : what they do not recognise is that it cuts away the foundation of the English doctrine and makes it inapplicable to India. The explanation of this is, I think, that the case all follow *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (1) which was decided before the House of Lords in *Kendall v. Hamilton* (2) showed more distinctly than *King v. Hoare* (3) that the right of joinder is the real foundation of the English rule. In *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (1) the judgment of Mr. Justice Kennedy in the first Court was based in part on the doctrine of election, which the majority of the House of Lords showed was in no sense the reason of the rule. Garth, C. J., correctly stated the effect of section 43 to be that it "allows the promisee to sue one or more of several promisors in one suit, and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him." If the learned Chief Justice had had before him the later judgments in *Kendall v. Hamilton* (2) and *In re Hodgson* (4), he would, I think, have recognised that the effect of such a prohibition is to make the doctrine of *King v. Hoare* (3) inapplicable. In the mistake which he made he was followed by Mr. Justice Muttisami Ayyar in *Gurusami Chetti v. Sanvarti Chinna Mannar Chetti* (5). Similarly in *Lakmadas Khimji v. Parshotam Haridas* (6) Mr. Justice Latham expressly held that section 43 of the Contract Act materially altered the rules of the English common law, and disallowed an objection by a partner defendant that the other partners should have been joined as defendants ; and yet, while thus clearly recognising that by reason of section 43 a joint debtor has no right to have his co-contractors joined as defendants, the learned Judge nevertheless held that the rule in *Kendall v. Hamilton* (2) would bar a fresh suit against the other partners. In *Motilal Bechar Dass v. Ghellabhai Hariram* (7) Mr. Justice Farran held in reference

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(1) (1878) I. L. R., 3 Cal., 353.

(4) (1885) L. R. 31 Ch. D., 177.

(2) (1879) L. R., 4 A. C., 504.

(5) (1881) I. L. R., 5 Mad., 37.

(3) (1844) 13 M. and W., 494.

(6) (1882) I. L. R., 6 Bom., 700.

(7) (1892) I. L. R., 17 Bom., 6.

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to section 13 that "in fact the liability under a contract is con-
 "ceded to appear to make all joint contract joint and several."
 If that is correct view on section 13, the doctrine of *King v.*
Hoare (1) is absolutely not applicable. In *Neerajam Chetty v.*
Le'sherman Chetty (2) the Court, following *Lakshadas Khengji*
v. Panchabhai Haridas (3) held that "it is not incumbent on a
 "person dealing with partners to make them all defendants: he is
 "at liberty to sue any one partner as he may choose." The Court
 expressly applied to partners not only section 13 of the Contract
 Act, but section 29 of the Code of Civil Procedure, which relates
 not to joint but to several and to joint and several liability. In
Rahmabhoj Habibbhoj v. Turner (4) Scott, J., in the first
 Court said that "section 13 of the Contract Act IX of 1872 is
 "not perhaps quite clear whether a complete adoption of the
 "English rule is intended." He, however, applied the decision
 in *Hemendro Coomarr Mullick v. Rajendrolall Moonshee* (5)
 to the case, which was one of joint wrong-doers. Whether the
 rule as to joint wrong-doers laid down in *Brimmead v. Harrison*
 (6) should be applied in the Indian Mufassil is a question
 which I need not consider. To such a question section 13 of
 the Contract Act would have no application.

In the other cases the effect of section 13 of the Contract
 Act on the doctrine of *King v. Hoare* (1) is altogether ignored.
 In their note to section 13, Messrs. Cunningham and Shephard,
 at pp. 158-159 of their commentary on the Indian Contract Act
 (7th ed.) say that "if this section is intended to deny to joint
 "debtors the right to be sued jointly in one suit, it involves a
 "departure from English law," and that "in view of this section
 "and the 29th section of the Code of Civil Procedure it is clear
 "that the non-joinder of a co-debtor is no ground of defence to
 "a suit; but it is apprehended that an application made under
 "the 32nd section of the Code to add as a defendant an omitted
 "co-debtor would be dealt with in the same manner as it is in
 "England." I cannot agree with this view. As the judgments
 in *Kendall v. Hamilton* (7) show, such an application would in

(1) (1844) 13 M. and W. 494.

(2) (1897) 1. L. R., 21 Mad., 230.

(3) (1882) 1. L. R., 6 Bom., 700.

(4) (1890) 1. L. R., 14 Bom., 408.

(5) (1878) 1. L. R., 2 Cal., 353.

(6) (1872) L. R., 7 C. P., 547.

(7) (1879) L. R., 4 A. C., 504.

England be dealt with in the same manner as the old plea in abatement, and the effect of the latest decisions is that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie* right to have his co-debtors joined. *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.* (1), *Robinson v. Geisel* (2). I agree with Garth, C. J., Latham, J., and the Madras High Court that under section 13 of the Contract Act the joint debtor has no such right.

For these reasons I am of opinion that the doctrine of *King v. Hoare* (3) and *Kendall v. Hamilton* (4) does not apply to the present case; that the cause of action against the defendants Nos. 1 to 15 on the mortgages in suit was not merged in the decree of the 5th May 1894, against the defendants Nos. 16 and 17 only; and that so far the suit against them is therefore not barred. Nor is it in my opinion barred by section 85 of the Transfer of Property Act, 1882: *Balmahund v. Sangari* (5) *Dharam Singh v. Angan Lal* (6). It was suggested that the suit was barred on a somewhat different ground, namely that the defendants Nos. 16 and 17 were in the position of agents of the joint family, contracting in their own names for themselves and the rest of the family, and that the decree of the 5th May 1894 against them was a bar to a subsequent suit on the contract against their principals, the other defendants, by reason of the principle laid down in *Priestley v. Fernie* (7) applied by Lord Cairns in *Kendall v. Hamilton* (1) at p. 511 of the report, and followed by this Court in *Bir Bahadur Sewak Pande v. Sarju Prasad* (8). In India the matter depends on the provisions of the Contract Act, and in particular on Chapter X of that Act relating to Agency. It is sufficient to say that it has never been held that the managing member of a joint Hindu family is an agent within the meaning of that chapter and of the rule in *Priestley v. Fernie* (7). I agree with the passage at p. 108 of the Tagore Law Lectures for 1870 where Mr. Cowell says:—"When therefore we come to define the "relation of each member, especially of the managing member, "to the joint family and the joint estate, we are brought into "contact with a relationship which has no counterpart in English

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(1) (1893) 1 Q. B., 422.

(2) (1894) 2 Q. B., 685.

(3) (1814) 13 M. and W., 494.

(4) (1879) L. R., 4 A. C., 504.

(5) (1897) L. L. R., 19 All., 379.

(6) (1899) L. L. R., 21 All., 301.

(7) (1865) 3 H. and C., 977.

(8) (1887) L. L. R., 9 All., 681.

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to section 13 that "as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several." If that is a correct view of section 43, the doctrine of *King v. Hoare* (1) is admittedly not applicable. In *Narayana Chetti v. Lakshmana Chetti* (2) the Court, following *Lukmidas Khimji v. Purshotam Haridas* (3) held that "it is not incumbent on a person dealing with partners to make them all defendants: he is at liberty to sue any one partner as he may choose." The Court expressly applied to partners not only section 13 of the Contract Act, but section 29 of the Code of Civil Procedure, which relates not to joint but to several and to joint and several liability. In *Rahmubhoy Hubibbhoy v. Turner* (4) Scott, J., in the first Court said that "section 43 of the Contract Act IX of 1872 is not perhaps quite clear whether a complete adoption of the English rule is intended." He, however, applied the decision in *Hemendro Coomar Mullick v. Rajendrolall Moonshree* (5) to the case, which was one of joint wrong-doers. Whether the rule as to joint wrong-doers laid down in *Brinsmead v. Harrison* (6) should be applied in the Indian Mufassil is a question which I need not consider. To such a question section 43 of the Contract Act would have no application.

In the other cases the effect of section 43 of the Contract Act on the doctrine of *King v. Hoare* (1) is altogether ignored. In their note to section 43, Messrs. Cunningham and Shephard, at pp. 158-159 of their commentary on the Indian Contract Act (7th ed.) say that "if this section is intended to deny to joint debtors the right to be sued jointly in one suit, it involves a departure from English law," and that "in view of this section and the 29th section of the Code of Civil Procedure it is clear that the non-joinder of a co-debtor is no ground of defence to a suit; but it is apprehended that an application made under the 32nd section of the Code to add as a defendant an omitted co-debtor would be dealt with in the same manner as it is in England." I cannot agree with this view. As the judgments in *Kendall v. Hamilton* (7) show, such an application would in

(1) (1844) 13 M. and W. 494.

(2) (1897) I. L. R., 21 Mad., 256.

(3) (1882) I. L. R., 6 Bom., 700.

(4) (1890) I. L. R., 14 Bom., 408.

(5) (1878) I. L. R., 2 Calc., 353.

(6) (1872) L. R., 7 C. P., 547.

(7) (1879) L. R., 4 A. C., 504.

England be dealt with in the same manner as the old plea in abatement, and the effect of the latest decisions is that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie* right to have his co-debtors joined. *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.* (1), *Robinson v. Geisel* (2). I agree with Gaith, C. J., Latham, J., and the Madras High Court that under section 13 of the Contract Act the joint debtor has no such right.

For these reasons I am of opinion that the doctrine of *King v. Hoare* (3) and *Kendall v. Hamilton* (4) does not apply to the present case; that the cause of action against the defendants Nos. 1 to 15 on the mortgages in suit was not merged in the decree of the 5th May 1894, against the defendants Nos. 16 and 17 only; and that so far the suit against them is therefore not barred. Nor is it in my opinion barred by section 85 of the Transfer of Property Act, 1882: *Balmakund v. Sangari* (5) *Dharam Singh v. Angan Lal* (6). It was suggested that the suit was barred on a somewhat different ground, namely that the defendants Nos. 16 and 17 were in the position of agents of the joint family, contracting in their own names for themselves and the rest of the family, and that the decree of the 5th May 1894 against them was a bar to a subsequent suit on the contract against their principals, the other defendants, by reason of the principle laid down in *Priestley v. Fernie* (7) applied by Lord Cairns in *Kendall v. Hamilton* (4) at p. 514 of the report, and followed by this Court in *Bir Bahaddar Sewak Pande v. Sarju Prasad* (8). In India the matter depends on the provisions of the Contract Act, and in particular on Chapter X of that Act relating to Agency. It is sufficient to say that it has never been held that the managing member of a joint Hindu family is an agent within the meaning of that chapter and of the rule in *Priestley v. Fernie* (7). I agree with the passage at p. 108 of the Tagore Law Lectures for 1870 where Mr. Cowell says:—"When therefore we come to define the "relation of each member, especially of the managing member, "to the joint family and the joint estate, we are brought into "contact with a relationship which has no counterpart in English

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(1) (1893) 1 Q. B., 422.

(2) (1891) 2 Q. B., 643.

(3) (1814) 3 M. and W., 194.

(4) (1879) L. R., 4 A. C., 501.

(5) (1897) L. L. R., 19 All., 379.

(6) (1899) L. L. R., 21 All., 301.

(7) (1865) 3 H. and C., 977.

(8) (1887) L. L. R., 9 All., 681.

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"law. Neither the term partner, nor principal, nor agent, nor even co-partener will strictly apply."

I am of opinion that the Court below ought not to have dismissed the suit, as it did, on the preliminary point, and that the appeal of the plaintiff should be allowed, the decree of the Court below set aside, and the case remanded to that Court under section 562 of the Code of Civil Procedure for disposal on the merits. The appellant will have his costs of this appeal. Other costs will abide the result.

BANERJI, J.—I agree in the judgment and order of the learned Chief Justice.

The Court below has held that the 43rd section of the Code of Civil Procedure bars the claim. That view is clearly erroneous. As the defendants Nos. 1 to 15, who are the real defendants to the suit and against whom alone the plaintiff seeks relief, were not parties to the former suit brought against the defendants Nos. 16 and 17, that section has no application. Although the learned Subordinate Judge refers to section 43, the basis of his decision is, as pointed out by the learned Chief Justice, that the cause of action for the present suit is the same as that for the previous suit; that both the suits relate to a joint debt; that the cause of action has merged in the decree obtained in the former suit; and that the present action is consequently not maintainable. He has followed the ruling in *Nuthoolall Chowdhry v. Showkee Lall* (1) which apparently adopted the principle recognised in the well-known case of *King v. Hoare* (2). The main question which we have to determine in this appeal, therefore, is whether the former judgment, though unsatisfied, bars this suit. That question was not decided in *Dharam Singh v. Angun Lal* (3) on which the learned counsel for the appellant relied. It was held in that case that it was not a case of a joint debt and joint contractors.

The judgment in the former suit would operate as a bar to the present claim if two conditions are fulfilled, namely, first, that the contracts of mortgage upon which the plaintiff's claim is founded were joint contracts by and on behalf of all the

(1) (1872) 10 B. L. R., 200; S. C. (2) (1844) 13 M. and W., 494.
18 W. R., 458.

(3) (1899) I. L. R., 21 All. 301.

defendants; and, second, that the rule laid down in *King v. Hoare* (1) is applicable. As to the first point there is no controversy. As to second, if the doctrine of *King v. Hoare* (1) cannot be held to apply, there is nothing in reason or justice to bar the suit.

If the plaintiff's statements are true the defendants Nos. 1 to 15 and their interest in the mortgaged property are equally with the defendants Nos. 16 and 17 and their interests liable for the debt, and unless a legal bar exists, of which the defendants are entitled to take advantage, they are not in a position to dispute the claim.

Now, is the rule adopted in *King v. Hoare* (1) applicable to this case? The reason for that rule was stated by Lord Cairns, L. C., in the later case of *Kendall v. Hamilton* (2), to be "that it is the right of persons jointly liable to pay a debt to insist on being sued together." I agree with the learned Chief Justice that that reason cannot apply to cases in this country, at least outside the presidency towns, since the passing of the Contract Act. Section 43 of that Act enables a promisee, in the absence of a contract to the contrary, to compel one or more of several joint promisors to perform the whole of the promise. Under section 43 therefore, it is not open to a defendant who has been sued as one of the several promisors to contend that all his co-promisors should be made parties to the suit, and so far as this country is concerned the reason on which the rule in *King v. Hoare* (1) is founded has ceased to exist. That rule is consequently no longer applicable. Further, the effect of section 43 is, as observed by Farran, J., in *Motilal Bechardass v. Ghellabhai Huriram* (3), "to make all joint contracts joint and several." Where the liability is joint and several and the judgment first obtained has remained unsatisfied a second suit is not barred. This is a proposition which admits of no doubt and is supported by the authorities cited by the learned Chief Justice in his judgment. Therefore, since the enactment of section 43 of the Contract Act, the recovery of a judgment against one of several joint debtors does not bar a subsequent suit against his co-debtors. The result is that in either view the present claim is maintainable. I am moreover not satisfied as to the expediency of extending the

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(1) (1914) 13 M and W, 491 (2) (1879) L. R., 4 A. C., 50 L.
(3) (1892) 1 L. R., 17 Bom, 6.

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doctrine of *King v. Houtre* (1) and *Kendall v. Hamilton* (2) to suits arising in these provinces. Having regard to the fact that the cases were based mainly on doctrines and rules of procedure peculiar to English law, there is evidently no reason why their authority should be recognised in the Courts in this country. The desirability of applying to cases in this country the rule laid down in those decisions was questioned by Mr. Justice Markby in *Hemendro Coomarr Mullick v. Rajendroball Moonshree* (3), and by Mr. Justice Muttusami Ayyar in *Gurusamm Chetti v. Samurtti Chinna Mannar Chetti* (4), and those learned Judges were of opinion that the rule might be productive of hardship in this country, as it undoubtedly would be in many cases. It was pointed out by Mr. Justice Markby that the rule was not recognised in any continental country in Europe, and in his dissentient judgment in *Kendall v. Hamilton*, (2) Lord Penzance considered it not to be consistent with justice. "What justice," his Lordship observed, "is there in saying that when three persons are all and each individually liable to pay a debt, an action and judgment (still unsatisfied) against two of them should extinguish the liability of the third?" He held the rule to be one of procedure, and characterized it as one "which, without affecting to assert any joint rights on the part of the defendants, denies the aid of the law to enforce those of the plaintiffs." "Procedure," he said, "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating, it is permitted to obstruct, and even extinguish legal rights, and is thus made to govern where it ought to subserve." Having regard to the fact that even in England the propriety of the rule has been questioned by high authority, I do not think there is sufficient justification for extending it to the Courts in these provinces. Upon grounds both of law and expediency, therefore, I am unable to hold that the plaintiff is precluded from maintaining the present suit by reason of the decree obtained by him in 1894.

I fully concur with the learned Chief Justice in the view that the manager of a joint Hindu family is not in the position of an

(1) (1844) 13 M. and W., 404.

(2) (1879) L. R., 4 A. C., 504.

(3) (1878) 1 B., 3 Cal., 353.

(4) (1881) L. L. R., 5 Mad., 37.

ordinary agent as regards the other members of the family. The contention of the learned counsel for the respondents, based on the argument that the defendants Nos. 16 and 17 were agents of the other defendants, cannot therefore prevail.

Appeal decreed and cause remanded.

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MUHAMMAD
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Before Mr Justice Banerji and Mr Justice Aikman.

SHEO SAMPAT PANDE AND ANOTHER (PLAINTIFFS) v. BANDHU

PRASAD MISR AND OTHERS (DEFENDANTS) *

Act No XIX of 1873 (N-W P Land Revenue Act), sections 166, 167, 168

—Act No XII of 1884 (Agriculturists' Loans Act), section 5—Takavi loan—Sale of house in default of payment of loan—Effect of such sale

The provisions of sections 166, 167 and 168 of the North-Western Provinces Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was held that such sale did not avoid the prior incumbrance.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Durga Charan Banerji for the appellants.

Pandit Sundar Lal (for whom Maulvi Ghulam Mujtaba) and Babu Jwan Chandar Mukerji for the respondents.

BANERJI and AIKMAN, JJ.—The decree of the lower appellate Court cannot possibly be supported. The suit was one for sale upon a mortgage. The property mortgaged consisted of a house and certain zamindari property. Subsequently to the mortgage the mortgagor took takavi advances from Government which he did not repay. The Government therefore caused the said house, upon the security of which the takavi advance had been made, to be sold, and Sheo Sahai, defendant, purchased it. Both the Courts below have dismissed the claim in respect of the house on the view that the purchase by Sheo Sahai conveyed to him the house free from the incumbrance created by the mortgage in suit. The learned Judge has relied on the provisions of section 167 of Act No. XIX of 1873, and holds that as arrears of takavi are, by virtue of section 5 of Act No. XII of 1884, realized in the same manner as arrears of land revenue, property

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April 17.

* Second Appeal No 700 of 1897, from a decree of Mr. V. A. Smith, Judge of Gorakhpur, dated the 22nd May, 1897, confirming the decree of Maulvi Saiyid Jafar Husain, Subordinate Judge of Gorakhpur, dated 19th February 1897.

ordinary agent as regards the other members of the family. The contention of the learned counsel for the respondents, based on the argument that the defendants Nos. 16 and 17 were agents of the other defendants, cannot therefore prevail.

Appeal decreed and cause remanded.

1900

MUHAMMAD
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RAM
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Before Mr Justice Banerji and Mr Justice Aikman
SHEO SAMPAT PANDE AND ANOTHER (PLAINTIFFS) v. RANDHU
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1900

April 17

Act No XIX of 1873 (N-W P Land Revenue Act), sections 166, 167, 168
—Act No XII of 1884 (Agriculturists' Loans Act), section 5—Takavi
loan—Sale of house in default of payment of loan—Effect of such sale

The provisions of sections 166, 167 and 168 of the North-Western Provinces Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was held that such sale did not avoid the prior incumbrance.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji* for the appellants.

Pandit *Sundar Lal* (for whom *Maulvi Ghulam Mujtaba*) and Babu *Jiwan Chandar Mukerji* for the respondents.

RANDEEJI and AIKMAN, JJ.—The decree of the lower appellate Court cannot possibly be supported. The suit was one for sale upon a mortgage. The property mortgaged consisted of a house and certain zamindari property. Subsequently to the mortgage the mortgagor took takavi advances from Government which he did not repay. The Government therefore caused the said house, upon the security of which the takavi advance had been made, to be sold, and Sheo Sahai, defendant, purchased it. Both the Courts below have dismissed the claim in respect of the house on the view that the purchase by Sheo Sahai conveyed to him the house free from the incumbrance created by the mortgage in suit. The learned Judge has relied on the provisions of section 167 of Act No. XIX of 1873, and holds that as arrears of takavi are, by virtue of section 5 of Act No. XII of 1884, realized in the same manner as arrears of land revenue, property

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sold for recovery of takavi loans is sold free of all incumbrances. The learned Judge has overlooked the fact that section 167 relates to the sale of the patti or mahal in respect of which an arrear of land revenue is due. In such a case the purchaser would no doubt acquire the patti or mahal sold free of all incumbrances. But if any property other than the patti or mahal in respect of which arrears are due be sold, the purchaser would only acquire the rights and interests which the defaulter had at the time of the sale, and any incumbrances created by him would not be rendered invalid by reason of the sale. This is clear from the provisions of section 168. The learned Judge no doubt refers to that section, but he says that the section would have applied had the house in question not been hypothecated to Government as security for the takavi loan.

We fail to see how the fact of a hypothecation subsequent to that in favour of the plaintiff can in any way affect the plaintiff's right under his prior mortgage and invalidate that mortgage as against the purchaser under the later hypothecation. The mortgagor, when he made the hypothecation in favour of Government, hypothecated only such rights as he had at the time of the hypothecation. Those rights were nothing more than the right to redeem the mortgage in favour of the plaintiff. In our opinion the Courts below erred in exempting from the claim the house purchased by Sheo Sahai, and we think the plaintiffs were entitled to a decree for the sale of that house.

We notice that although in the judgment of the Court of first instance the house was exempted from liability for the claim, the decree which was drawn up directed the sale of the house. This was evidently an oversight as the decree totally exempted Sheo Sahai from liability.

We allow the appeal and make a decree in favour of the plaintiff for the sale of the whole of the property mentioned in the plaint. We extend the time for the payment of the mortgage money to the 1st August, 1900. The appellants will get their costs of this appeal and of the appeal to the Court below from Sheo Sahai, defendant, who will also be liable for the costs of the Court of first instance.

Appeal decreed.

REVISIONAL CRIMINAL.

1900
April 20*Before Mr. Justice Burkill.*QUEEN EMPRESS *v.* SAMUEL LUKE *

Act No XI of 1878 (Indian Arms Act), section 19(f)—Notification No 458 of the 18th March, 1898—Exemptions from the operation of the Arms Act—Volunteers

A volunteer, being a person exempted in virtue of Notification No 458, dated 18th March, 1898, of the Government of India, is not exempted merely with reference to his duties as a volunteer, but generally (subject to the exceptions mentioned in the said Notification) It is therefore not unlawful for a volunteer to possess fire arms and to use the same.

THIS was an application for revision of an order passed by a Magistrate of the Philibhit district. The facts of the case sufficiently appear from the order of the Court.

Mr. R. K. Sorabji, for the applicant.

The Government Pleader (Munshi Ram Prasad), for the Crown.

BURKITT, J.—This is an application in revision against the conviction and sentence passed on the applicant by a Sub-Divisional Magistrate in the Philibhit district under section 19(f) of the Indian Arms Act, No. XI of 1878. The Magistrate found that the petitioner had fire-arms in his possession in contravention of the prohibition contained in section 14 of the Act.

The learned Government Pleader very properly admits that the conviction and sentence cannot be supported. The plea raised by the learned counsel who appeared for the applicant is that "as a volunteer petitioner is exempted from the operation of the section under which he has been convicted." That plea, in my opinion, is a good plea, and must be allowed.

The Magistrate who convicted the petitioner admits that the petitioner is a volunteer. It would therefore, *prima facie*, appear that under the provisions of the Government Notification No. 458, dated the 18th March, 1898, the petitioner did not commit any offence in having fire-arms in his possession. The Magistrate, however, has an easy way of getting over that difficulty. He contemptuously brushes it aside by holding that though the petitioner is a volunteer, and as such "is exempt from the operation

* Criminal Revision, No. 177 of 1900.

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"of the Arms Act, 1878," * * * * * "he is exempt only for the purposes of volunteering. He is not exempt from possessing fowling pieces, which he did (*sic*) in spite of his fowling piece having been confiscated by the District Magistrate." The Magistrate further found that in spite of the previous warning the applicant "has again possessed himself of the fowling pieces," and "uses these fowling pieces in shooting wild animals." (The former case mentioned by the Magistrate is one in which in another district the applicant was convicted of a similar offence under the Arms Act. In that case he was let off with a warning, and his gun was confiscated. The Sessions Judge on appeal held that he ought to have been fined under section 19 (e) of the Arms Act, 1878.) The Magistrate goes on to add that the petitioner "should have obtained a license under the Arms Act, 1878, if * "he wanted fowling pieces for the protection of his cultivation. "As a volunteer he is not entitled to keep fowling pieces, nor is he entitled as such to use them for the purpose of protecting his cultivation." Acting on his view the Magistrate inflicted a fine on the applicant and directed his guns to be confiscated.

In my opinion the Magistrate has adopted an absurdly erroneous view of the law. I have no hesitation in holding that, being admittedly a volunteer, the applicant is (to use the language of the Magistrate) entitled to keep fowling pieces, and to use them for the purpose of protecting his cultivation. I know of no authority for the interpretation put by the Magistrate on the words "all volunteers" in the Notification mentioned above, nor has the Magistrate cited any. Those words, read in their ordinary grammatical sense, exempt "all volunteers" from the operation of all the prohibitions and directions contained in sections 13, 14, 15, and 16 of the Arms Act, with certain exceptions not in point in this case. The Magistrate does not accept that view. He holds that the applicant "is exempt only for purposes of volunteering." It is difficult to say what meaning the Magistrate intended to be put on those words. Most probably they mean that applicant was entitled to the benefit of the exemption only when attending volunteer parades and when in possession of the rifle which had been entrusted to his care as a volunteer. If this restricted meaning is to be attached to the words "all volunteers," a

similar restriction must necessarily be applied to all the other classes of person exempted in similar language. The result of this would be absurd in many cases: to take one case among many, it would render it illegal for native commissioned officers of Her Majesty's native army to possess or use, unless they had obtained license under the Act, any arms other than those supplied to them by Government for military purposes.

I cannot believe that it was intended that such a narrow and restricted interpretation should be placed on the Notification. On the contrary, I believe that the exemption of "all volunteers" from the operation of the prohibitions and directions contained in certain sections of the Arms Act, 1878, was granted with a view to encourage volunteering among that class of the public who otherwise would be subject to those prohibitions and directions. But as interpreted by the Magistrate in this case the Notification is inoperative as far as volunteers of that class are concerned. It would leave them in exactly the same position as before under the Arms Act, and it would still be necessary for volunteers of that class, who, like the applicant, desire to possess and use fire-arms, to take out licenses under the Act. It follows, as a necessary consequence of this interpretation, that it is only by virtue of the exemption in the Government Notification mentioned above that volunteers, like the applicant, and officers and soldiers of the native army, can legally possess and use the arms supplied to them for volunteering and military purposes. In my opinion that interpretation is wrong and would defeat the object aimed at by the Notification. I hold that the applicant was not bound to take out a license for the fire-arms he possessed, and was therefore improperly convicted. Accordingly, setting aside the conviction and sentence, I direct that the fine, if paid, be refunded and that the confiscated guns be restored to the applicant.

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1900
April 27.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAM KUNWAR (PLAINTIFF) *v* RAM DAI (DEFENDANT) *

Hindu law—Hindu widow—Right to maintenance—Sale of property in respect of which the widow's right to maintenance might be enforceable—1st No IV of 1882 (Transfer of Property Act), section 39

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement, and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. *Sham Lal v Banna* (1) and *Lakshman Ramchandra Joshi v Satyabhamabai* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji and Pandit Sundar Lal, for the appellant.
Pandit Moti Lal, for the respondent.

BANERJI and AIKMAN, JJ.—The appellant, who is the widow of one Thakur Gird Prasad Singh, brought the suit out of which this appeal has arisen to recover arrears of maintenance from her husband's sons and from the estate left by her deceased husband, a part of which is in the possession of the respondent, who was the third defendant in the court of first instance, under a usufructuary mortgage executed by one of the sons on the 19th April, 1894. Previously to the institution of the suit the plaintiff had sued the sons for her maintenance, and obtained decrees, the earliest of which was passed in 1887. The present suit was opposed by the respondent, who claimed to be a transferee for consideration, without notice of the plaintiff's right. The court of first instance decreed the claim against her, but the lower appellate court set aside that portion of the decree which affected the respondent. The plaintiff has preferred this appeal, and the question we have to determine is, whether the property in the hands of the respondent is liable for the amount claimed by the plaintiff.

* Second Appeal No 774 of 1897 from a decree of L G Evans, Esq., District Judge of Aligarh, dated the 3rd June 1897, modifying a decree of Babu Bipin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 3rd March 1896.

(1) (1882) I. L. R., 4 All., 296.

(2) (1877) I. L. R., 2 Bom., 494.

Both the courts below have found that the respondent is a mortgagee for consideration, but had notice of the plaintiff's right. The first court also held that the transfer under which she is in possession was made with the intention of defrauding the plaintiff, and depriving her of her right, and applied the provisions of section 39 of the Transfer of Property Act. The lower appellate court, however, was of a contrary opinion, and found that the mortgage was not made with the intention of defeating the plaintiff's right to maintenance. It held that the claim could not be enforced against that portion of the property which is in the respondent's hands, although she had notice of the appellant's rights.

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It is conceded that the maintenance of a Hindu widow is not a charge upon the estate of her deceased husband, until it is fixed and charged upon the estate by a decree or by agreement. This was held by a Full Bench of this Court in the case of *Sham Lal v. Banna* (1). It is further conceded that there was no agreement by which any particular property was charged with the maintenance of the plaintiff. It is, however, contended that the decree obtained by the plaintiff on 22nd August 1887, created a charge upon the property left by the deceased husband of the plaintiff. If this is so, the respondent took the property, of which she is the mortgagee, subject to that charge, and cannot claim exemption from liability. We have examined the decree of 22nd August 1887, and have satisfied ourselves that the only charge declared by that decree was a charge for the amount of maintenance which had already accrued due and was decreed to the plaintiff. No charge for future maintenance was created by the decree. Such being the case, the learned counsel for the appellant next relies upon section 39 of Act No IV of 1882, and in particular on the concluding words of that section. That section, so far as it relates to maintenance, provides that "where a third person has a right to receive maintenance from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention, or if the transfer is gratuitous, but not against a transferee for consideration and without notice of

. (1) (1882) I. L. R., 4 All., 296.

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the right, nor against such property in his hands." The object of the section, so far as it relates to maintenance, is to declare in what cases a right of maintenance may be enforced against transferees of the property from which the maintenance is recoverable. In our opinion an essential condition for the enforcement of the right under the section against a transferee is that the transfer has been made with the intention of defeating the right. Where a transfer has been made with such intention and the transferee has notice of it, he cannot defeat the right, although he may be a transferee for consideration. Again, if the transfer is gratuitous, the transferee can in no case defeat the right. Where, however, the transfer is for consideration, and the transferee has no notice of the right, it cannot be enforced against him, even if the transfer was made with the intention of defeating the right. As we read the section, a condition precedent to the enforcement of the right against the transferee in all cases is that the transferor has acted in fraud of the person entitled to the right. The words "and such property is transferred with the intention of defeating such right" govern all that follows those words. Given a right to receive maintenance from the profits of immovable property and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value and without notice of the right. But where the transfer has not been made with such object, the right cannot be enforced against the transferee, although he had notice of the right. As observed in the commentaries on the Transfer of Property Act by Messrs. Shephard and Browne, something more than mere notice of the right has to be proved against a transferee. It must also be established that the transfer was made in bad faith, that is, with the intention of defeating the right. The reason for such a rule is not far to seek. A Hindu widow's right to receive maintenance has been held to be a right of an indefinite character, which, unless made a charge upon property by agreement or by a decree of court, is only enforceable like any other liability in respect of which no charge exists. See the Full Bench decision in *Sham Lal v. Banna* (1). A right of such a nature should not equitably be enforced against a transferee for value unless the transfer was

(1) (1882) I. L. R., 4 All., 293, at p. 299.

made in fraud of the right of maintenance. In *Lakshman Ramchandra Joshi v. Satyabhamabar* (1) it was held that the mere circumstance that a purchaser for value had notice of the claim for maintenance is not conclusive of the widow's rights against the property in his hands. Mr Justice West further held that "what was honestly purchased is free from her claim for ever. what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first." As pointed out by Mr. Mayne in his work on Hindu Law, paragraph 421, page 518, 5th Edition, section 39 of the Transfer of Property Act, substantially gives effect to the views expressed in the case cited above.

For these reasons we are of opinion that the view taken by the learned Judge of the lower appellate court is right and that this appeal must fail. We dismiss it with costs.

Appeal dismissed.

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v
RAM DAI.

Before Mr Justice Banerji and Mr. Justice Arkman
ASHIQ HUSAIN (OBJECTOR) v. MUHAMMAD JAN AND OTHERS
(APPLICANTS)*

1900
April 28.

*Act No. XIX of 1873 (N.-W P Land Revenue Act), sections 107 et seqq—
Partition—Revenue Courts not competent to partition buildings.*

In a partition under the North Western Provinces Land Revenue Act, 1879, neither buildings nor the materials thereof can be partitioned, what is partitioned is the land in the mahal. Where such land is covered with buildings, the Court making the partition has to follow the provisions of section 124 of the Act, but it can decide no question of right to the buildings, nor can it partition them.

THIS appeal arose out of an application made by the respondents for partition of certain resumed muafi and shamilat lands in the village of Muhammadpur, together with the buildings thereon, consisting of various shops and houses. Objections were filed by the appellant Ashiq Husain, including one, to the effect that the Revenue Court* was not competent to partition the shops and houses. These objections were disallowed summarily by an Assistant Collector, but on appeal the District Judge made an

* Second Appeal No. 829 of 1897 from a decree of C Rustomjee, Esq., District Judge of Moradabad, dated the 5th August 1897, confirming the order of Kuar Bahadur, Assistant Collector of Moradabad, dated the 18th June 1895.

• (1) (1877) I. L. R., 2 Bom, 494.

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order of remand under section 562 of the Code of Civil Procedure. On this remand the Assistant Collector went into the case at length and passed an order directing the partition of nine shops and buildings appertaining thereto, as also of a certain *divan khana* and *rath khana*.

From this order the objector, Ashiq Husain, appealed to the District Judge, again urging that the order for partition of the buildings was not within the competence of a Court of Revenue.

The District Judge, apparently without considering the question of jurisdiction raised by the appellant's first plea, dismissed the appeal and confirmed the order of the Assistant Collector.

The appellant thereupon appealed to the High Court.

Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Munsbi *Gobind Prasad*, for the respondents.

BANERJI and ATKMAN, JJ.—This appeal arises out of an application for partition made under Act No. XIX of 1873. Some objections having been raised, the Court of Revenue tried those questions under section 113 of the Act. In doing so the Assistant Collector determined the extent of the shares of the different owners of the mahal in respect of certain buildings, and ordered that the Amin should make a partition of the buildings, including rafters, bricks, stones and other materials of each building. We are surprised that such an order of the Assistant Collector, which was manifestly *ultra vires*, has been sustained by the learned District Judge. It is beyond question that in partition proceedings under the North-Western Provinces Land Revenue Act neither buildings nor the materials thereof can be partitioned. What is partitioned is the land of the mahal: where such land is covered by buildings the Court making the partition has to follow the provisions of section 124 of the Act, but it can decide no question of right to the buildings, nor can it partition them. We allow the appeal and set aside so much of the order of the Courts below as directs the partition of the buildings in question. The parties will pay their own costs in all Courts.

[This ruling was followed by Banerji, J., in Second Appeal No. 13 of 1903, decided on the 9th June, 1900, the judgment in

which is printed below.* See also the case of *Abdul Rahman v. Mashina Bibi* (1)—Ed.]

Decree modified.

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JAN.

1900
April 30.

Before Mr. Knox, Acting Chief Justice, and Mr. Justice Blair.

SHIAM KARAN AND ANOTHER (JUDGMENT-DEBTORS) v. RAGHUNANDAN PRASAD AND ANOTHER (DECREE-HOLDERS) †

Letters Patent, section 8—Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor.

Held, that the presentation of an appeal by a person who was not an advocate, vakil or attorney, of the Court, nor a suitor, is not a valid presentation in law, having regard to section 8 of the Letters Patent of the High Court.

* BANERJI, J.—I think that the decree of the Court below is right and this appeal must be dismissed. The suit relates to a one-fourth share of the walls of an enclosure, and to gates, and turrets appertaining to a garhi in the village Talra. The plaintiff claims a moiety of the said share. He is one of the three sons of one Jawahir Singh. The defendants are his nephews, being the sons of the plaintiff's brother Fateh Singh. The third brother, Anup Singh, is dead and left no issue. The plaintiff's case is that the three brothers were joint, that the property in question was acquired with joint funds, and that consequently he is entitled to a half share of the said property. It appears that a partition of the village has been effected and the shares owned by the parties have been divided by the Revenue Authorities. The walls, gates, and turrets in suit are said to have been allotted by the Revenue Authorities to the defendants as appertaining to their share. It is in consequence of this order of the Revenue Authorities that the plaintiff has brought the present suit. The lower appellate Court has found as a fact that the property was acquired by Anup Singh when the family was joint, that the plaintiff and the defendant's father Fateh Singh lived jointly with Anup Singh, and that upon Anup Singh's death both of them became owners in equal moieties of the property in question. It has also been found that the defendants had failed to prove that the property had been acquired separately by Fateh Singh. That Court has decreed the plaintiff's claim with the exception of a small portion of it with which we are not concerned in this appeal. The first two pleas taken in the memorandum of appeal are to the effect that the decision by the Revenue Authorities precludes the plaintiff from maintaining the present suit. This objection is, in my opinion, utterly untenable. It was not within the competency of the Revenue Authorities to partition a building. It is only the land of a mahal which the Revenue Authorities are empowered to partition by Act No. XIX of 1873. If those authorities took upon themselves to partition the buildings, that is, the walls, the gates, and the turrets in suit, they acted *ultra vires*. This was held in second appeal No. 829 of 1897, decided on the 26th of April, 1900. Further, I notice that in this case the District Judge held in the appeal preferred to him from the order passed in the partition proceedings that the parties should have their rights to the buildings determined by a civil suit. It is clear, therefore, that the plaintiff is not precluded from maintaining the present suit in the Civil Court as held by the Courts below. The other grounds of appeal must, having regard to the findings of the lower appellate Court, fail. As I have said above, that Court has found, and I think upon cogent grounds, that the property was joint. Therefore the plaintiff was entitled to the decree which has been granted to him. I dismiss the appeal with costs.

† First Appeal from order No. 121 of 1899 from an order of Babu Kunwar Mohan Lal, Subordinate Judge of Benares, dated 15th July 1899.

• (1) Weekly Notes, 1899, p. 42.

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IN this case the petition of appeal was signed and presented to the Court by a person who was neither an advocate, vakil or attorney of the Court, nor a suitor, but who appears to have been a mukhtar-a'am of the appellant. At the hearing of the appeal a preliminary objection was taken that this was not a valid presentation, having regard to section 8 of the Letters Patent.

Munshi *Gulzari Lal* for the appellants.

Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the respondents.

KNOX, ACTING C. J., and BLAIR, J.—A preliminary objection has been taken to the effect that the petition of appeal, which was presented in this Court, was presented by an agent and not by any of the persons enumerated in section 8 of the Letters Patent of this Court. The memorandum of appeal appears to have been presented by some person who was clearly neither of the appellants before the Court, and who may or may not be a person holding a power-of-attorney to appear and act on behalf of the appellant. It is contended that a mere presentation of an appeal does not come within the words of section 8. We hold that this contention is wrong. The words of section 8 are very clear and positive. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1900
May 2.

Before Mr. Knox, Acting Chief Justice, and Mr. Justice Blair.

MANMOTHONATH BOSE MULLICK (PLAINTIFF) v. BASANTO KUMAR BOSE MULLICK (DEFENDANT).*

Act No. VIII of 1890 (Guardian and Wards Act), section 41—Guardian and Ward—Death of guardian—Suit by ward against guardian's son for rendition of accounts.

Held, that no suit would lie by a ward against the son of his late guardian for rendition of accounts. *Rameshwar Tiwari v. Kishun Kumar* (1) referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Satish Chandar Banerji* for the appellant.

*First Appeal from Order No. 117 of 1899 from an order of Khan Bahadur Mir Akbar Husain, dated the 14th September 1899.

(1) Weekly Notes, 1882, p. 6.

Babu *Jiwan Chandar Mukarji* (for whom Pandit *Baldeo Ram Dave*), for the respondent.

KNOX, ACTING C. J., and BLAIR, J.—The plaintiff, who is the appellant before us, filed a suit in the Court of the Munsif of Allahabad, alleging that one Babu Tara Kinker Bose Mullick, who had been appointed his guardian, had not rendered accounts beyond the first year of such guardianship, that the said guardian died during plaintiff's minority, and that "the plaintiff has every reason to believe that out of the said assets the said Babu Tara Kinker Bose Mullick misappropriated a large sum of money to his own use." Nothing further was alleged either as to the nature, quantity, kind or manner of the misappropriation which the plaintiff believed had been made. But the plaintiff called upon the defendant, who is the son of the said guardian, to settle the accounts of the estate, to pay out of the estate any sum or sums found due upon such settlement of accounts, or if the accounts could not be settled, to pay such sum or sums as the plaintiff might succeed in proving to be due. The Court of first instance decided that the son was bound to render an account. In appeal the District Judge held that the son could not be called upon to render accounts, and that it was no business of his to do so; that the plaintiff could call upon him to hand over any papers, account-books, &c., relating to the estate which might have come into his possession. He further held that upon such a vague allegation of misappropriation no decree could be given against the defendant. He accordingly set aside the decree for the rendition of accounts, and remanded the case to the Court below with instructions to frame an issue regarding the items believed to have been misappropriated. In appeal before us the appellant urges that as the respondent is in possession of his father's estate, he can be held liable to render accounts, and more to account to him for the period of his father's management. For this proposition no authority was cited to us beyond certain principles said to be found in the case of *Concha v. Murrieta* (1). That case related to special circumstances based upon the law of Peru. On the other hand, we have a case of this Court, namely, *Rameshwar Tiwari v. Kishun Kumar* (2). The learned

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(1) (1889) L. R., 40, Ch. D., 543.

(2) Weekly Notes, 1882, p. 6.

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Judges who decided that case evidently considered that the law governing a relationship of the special nature must be looked for within the four corners of the Statute which created that relationship; the same law governs the present case; and they held that under section 21 of Act No. XL of 1858 the Judge had no power to require the heirs of a guardian to account for moneys received and disbursed by the father in the capacity of a guardian. The provisions of section 21 are personal to the guardian himself, and refer to cases in which his certificate has been recalled for incompetency, dishonesty or some other good cause, and not where his appointment has lapsed through death. This precedent was presumably known to the Legislature when they enacted Act No. VIII of 1890, and from the words used by them in section 41 of that Act, it seems to have been considered as the law which should prevail upon the point. The respondent has filed objections, and one of them is to the effect that the present suit would not lie. The objection is a good one and fatal to the suit.

We dismiss the appeal, and upon the objection taken we set aside the order of remand, and further direct that the suit as brought stand dismissed with costs in all Courts.

Appeal dismissed.

1900
 May 3

Before Sir Arthur Strachey, Knight Chief Justice, and Mr Justice Banerji.

MALIK MUHAMMAD KARIM AND OTHERS (PLAINTIFFS) v GANGA
 PANDE AND OTHERS (DEFENDANTS) *

Act No XII of 1881 (N.W. P. Rent Act), sections 93, 94—Suit for recorded share of profits—Suit for settlement of accounts—Limitation.

Where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the lambardar or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts

* Appeal No 5 of 1899 under section 10 of the Letters Patent.

incidentally to that main object, and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of section 93 (h) of the N.W.P. Rent Act, 1881 *Kohan v Jwala Prasad* (1), explained *Indo v Indo* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the appellants.

Babu *Parbat Charan Chatterji*, for the respondents.

STRACHEY, C. J., and BANERJI, J.—We need not call upon the learned counsel for the appellants to reply. The suit clearly falls within section 93 (h) of the Rent Act (XII of 1881). The only question is whether it falls within the first category of suits mentioned in that clause, namely, suits by recorded co-sharers for their recorded share of the profits of a mahál, or within the second category of suits for a settlement of accounts. If it falls within the first category, then under the first paragraph of section 94 the period of limitation is three years from the day when the share became due: if it falls within the second category, then, under the third paragraph of section 94, the period of limitation is one year from the day on which the right to sue accrued. Mr. Justice Burkitt has held that the suit is one for a settlement of accounts, and that having been brought more than one year from the day on which the right to sue accrued, it was barred by paragraph 3 of section 94. Now in order to see whether the suit falls within the first or the second category mentioned in section 93 (h), it is necessary to look at the plaint. The suit purports to be brought by certain co-sharers of the village against certain other co-sharers. It is headed as a “claim for the recovery of Rs 516-11-6 principal and interest after adjustment of account from 1301 to 1303 Fasli, on account of lands in mauza Poni, pargana Ghosi.” It sets forth that the profits arising from the plaintiff's share during the years in question amounted to Rs. 2,000 odd, out of which the plaintiff's received from the tenants Rs. 1,600 odd, and that the remaining sum of Rs. 436-11-6 due to the plaintiffs was appropriated by the defendants, first party. It further alleges that out of the profits for the years in question the defendants have collected Rs. 436-11-6 on account of the plaintiffs' share in excess of the defendants'

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(1) (1894) I. L. R., 16 All., 333.

(2) (1893) I. L. R., 16 All., 23

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own share of the profits, and have not paid it in spite of repeated demands. The only relief prayed in the plaint, apart from costs, is that a decree for the recovery of Rs. 433-11-6 principal, and Rs. 80 interest, in all Rs 516-11-6 may be passed in favour of the plaintiffs against the defendants. There is no specific prayer referring to accounts. The only allusion to an account is in the heading of the plaint, where the claim is described as one for the recovery of Rs. 516 "after adjustment of accounts." It is thus clear that the main and substantial object of the suit is to recover from the defendants with interest a specific sum which the defendants are alleged to have recovered from the tenants in excess of their own share of the profits and to hold on account of the plaintiffs' share. For the purpose of ascertaining the correctness of the amount claimed, but for no other purpose, the Court is asked to adjust the accounts. Now this being the nature of the claim, the ruling of the Full Bench in *Rohan v. Jwala Prasad* (1) appears to us to show clearly that the suit falls within the first category mentioned in section 93 (h) and not within the second category. The Full Bench held in effect that where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the lambardár or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts incidentally to that main object and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of section 93 (h). Now the claim in that case very closely resembled the claim in the present case. There a specific sum was claimed by a recorded co-sharer against four

(1) (1894) I. L. R., 16 All., 333.

other co-sharers in the village, not against the lambardár, as a share of the profits which the defendants were alleged to have realized in excess of what they were entitled to. The plaintiff asked for the recovery of the amount claimed "by means of adjustment of account," the same expression as is used in the plaintiff before us in the only reference which it makes to accounts. The prayer was there, as here, not any prayer referring to a settlement of accounts, but a decree for the specific amount claimed with interest. It was held by the Full Bench that, notwithstanding the reference to an adjustment of accounts, the suit fell within the first category of section 93 (*h*) and was for the purposes of limitation to be regarded as a suit for a share of the profits of a mahál. We cannot agree with the learned Judge who heard this appeal that the present suit falls within the second category of cases mentioned by the Full Bench. We think that it clearly falls within the first category. The learned pleader for the respondent has referred to an earlier Full Bench case of *Indo v. Indo* (1). It is not necessary to discuss that case beyond saying that if the decision lays down anything inconsistent with the case of *Rohan v. Jwalu Prasad* (2), it must be taken to have been overruled by that case, which was decided by six Judges of the Court, including the three Judges who were parties to the former case.

Mr. Justice Burkitt does not in his judgment discuss the other points raised by the memorandum of appeal to this Court. We have heard the pleader for the respondent in support of these pleas, and we think there is no force in any of them.

We allow this appeal, set aside the judgment of Mr. Justice Burkitt and dismiss the appeal to this Court with costs.

[A similar case was decided by Banerji, J., on the 6th June, 1900, S. A. No. 891 of 1899, the judgment in which is given below*.—ED.]

Appeal decreed.

* BANERJI, J.—The suit which has given rise to this appeal was brought under cl. (*h*) of section 93 of Act No. XII of 1881, for the plaintiffs' recorded share of profits for the years 1302, 1303 and 1304 Fasli. The plaintiffs own a fourth share in Khata No. 21, and an eighth share in Khata No. 22, and they seek to recover the amount claimed as arrears of profits in respect of those

(1) (1893) I. L. R., 16 All., 28. (2) (1894) I. L. R., 16 All., 333.

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MALIK
MUHAMMAD
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v
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PANDE.

1906
May 5.

Before Mr. Justice Burkitt and Mr. Justice Henderson.
BANSIDHAR AND OTHERS (DEFENDANTS) v. GANESHI AND ANOTHER
(PLAINTIFFS).*

Hindu Law—Mitakshara—Succession—Daughter's daughter.

Held, that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grandfather.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal*, for the appellants.

Mr. *E. Chamier* and Pandit *Madan Mohan Malaviya*, for the respondents.

HENDERSON, J. (BURKITT, J., concurring).—In this case it appears that on the 21st July 1842, one Rai Singh sold certain land for Rs. 351. The sale-deed, after reciting that the price had been paid and possession given to the vendee, contained the following provision :—"If the said vendee should on another occasion sell the said property, then for the same price he shall sell to me the vendor, and in case of my refusal he shall sell to any other person."

shares for the three years mentioned above. The Lower Appellate Court was of opinion that the suit was one for a settlement of accounts, and applying to the suit the limitation of one year prescribed by section 94 of the Act, has dismissed the claim in respect of the profits for the years 1802 and 1803 Faslî on the ground of limitation. This view of the learned Judge is clearly erroneous. As I have said above, the suit was in terms a suit for profits and not one for a settlement of accounts. The distinction between the two classes of suits was explained by the Full Bench in the case of *Rohan v. Jwala Prasad* (1). It was there held that a suit for profits does not become a suit for a settlement of accounts because the Court may have to take an account for the purpose of granting a decree to the plaintiff. It is only when the main object of the suit is to have an account taken from the defendant that the suit becomes one for a settlement of accounts. Such is not the case here. The learned Judge of the Lower Appellate Court thinks that because an account had to be taken of the rent payable by the defendants for the *khudkâshî* land held by them, the suit must be taken to be a suit for a settlement of accounts. Having regard to the Full Bench ruling referred to above, that view cannot be supported. The suit was in terms one for profits, and it was in substance a suit of that description. This case is very similar to the case of *Malik-Muhammad Karim v. Ganga Pande* (L. P. A., No. 5 of 1899) decided on the 31d of May 1899, and following the ruling in that case I hold that the present suit is one for profits and not for a settlement of accounts. No portion of the claim was therefore barred by limitation.

* Second Appeal No. 851 of 1897, from a decree of Maulvi Muhammad Anwar Hussain, Subordinate Judge of Aligarh, dated the 17th August 1897, reversing a decree of Maulvi Abdul Rahim, Munsif of Kasganj, dated the 18th December, 1898.

(1) (1894) I. L. R., 16 All., 333.

On the 15th December 1892, the representatives of the vendee, who had in the meantime died, sold a one-sixth share of the land to the defendants for Rs. 1,000 without giving the persons claiming to be the representatives of the vendor, who had also died, the option of purchasing the share.

In 1893 the plaintiffs, who are the daughter's daughter of the vendor and her son, claiming to be the heirs of the original vendor, sued the defendants, the purchasers of the $\frac{1}{6}$ th share, to recover that share on payment of Rs. 58-8-0, that sum being a one-sixth of the original price.

The lower appellate Court dismissed the suit, and on an appeal preferred to this Court, it was held by another Bench that the provision in the deed to which we have referred amounted to a covenant running with the land and was binding upon any purchaser. It was also held that the benefit of the covenant inured to the heirs of the original vendor, and that they would be entitled to sue upon the covenant, and the case was remanded to the lower Court for re-trial.

On remand the lower appellate Court found that the plaintiffs are both heirs of the original vendor, and has given them a decree for possession of the land on payment of Rs. 58-8-0.

The defendants have now appealed to this Court. The questions whether the plaintiffs (or either of them) are entitled to the benefit of the provision which has been held by another Bench of this Court to be a covenant running with the land, and whether that provision is binding upon the defendants, is not now before us, and we therefore refrain from expressing any opinion upon those questions.

The only points which are now open to us are whether the plaintiffs are the heirs of the original vendor, and whether, on the construction of the deed of sale, the price to be paid on a re-sale was the original price, or the price which an intending purchaser was prepared to give.

As to the first point, we think it is clear, on the authorities which have been quoted before us, and the learned vakil for the appellant at the end of the argument on the other side was forced to admit, that in the absence of preferential male heirs the plaintiff Ganshi is heir to her maternal grandfather, the original

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vendor. It has been found by the lower appellate Court, and the finding has not been challenged, that there are no preferential male heirs.

The other point as to the construction of the deed is not free from difficulty. On the whole, however, we are of opinion that the contract between the original vendor and vendee was that the price to be paid on a re-sale was the original price mentioned in the deed of sale. We therefore dismiss this appeal and affirm the decree of the lower appellate Court as far as the female plaintiff is concerned.

The added plaintiff, the son of the female plaintiff, has no title during his mother's lifetime, and is not entitled to a decree jointly with her. His suit must be dismissed, but, under the circumstances, without costs. Musammat Ganeshi is entitled to her costs in this Court.

Decree modified.

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May 14.

REVISIONAL CRIMINAL.

Before Mr. Knox, Acting Chief Justice, and Mr. Justice Blair.

QUEEN EMPRESS v. NARAIN SINGH.*

Criminal Procedure Code, section 556—Act No V of 1881 (Police Act), section 29—Trial by District Magistrate for breach of orders of a Reserve Inspector of Police—Magistrate not "personally interested."

Held, that the Magistrate of a district was not, on account of his being the head of the police of the district, debarred by reason of section 556 of the Code of Criminal Procedure from trying a person accused under section 29 of the Police Act, 1861, of a breach of the orders of a Reserve Inspector of Police.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Jhānsi in respect of an order passed by the District Magistrate of Jhānsi, whereby the Magistrate had convicted one Narain Singh of a breach of an order issued by a Reserve Inspector and had sentenced him to two months' rigorous imprisonment under section 29 of Act V of 1861. The Sessions Judge was of opinion (1) that it was not proved that the accused knew of the order in question and wilfully disobeyed it, and (2) that the Magistrate as head of

* Criminal Revision No. 215 of 1900.

the police in the district was debarred by section 556 of the Code of Criminal Procedure from trying the case. The Sessions Judge was of opinion that "the Full Bench ruling of the Allahabad High Court in the matter of the petition of *Ganeshi* (1) has been practically overruled by the addition of the illustration to section 556, Criminal Procedure Code, by Act V of 1898."

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The facts of the case are more fully stated in the order of the Court.

KNOX, ACTING C. J., and BLAIR, J.—Narain Singh, a constable, was convicted by the District Magistrate of Jhansi of an offence under section 29 of Act V of 1861, and sentenced to two months' rigorous imprisonment. Narain Singh was a recruit, and, as such, under the orders of the Reserve Inspector. There is evidence on the record that all policemen at every parade from the 11th were informed by orders of the Reserve Inspector that no recruit was to be absent from the lines without a pass. Upon the evidence the District Magistrate rightly found, if he believed the evidence, which he did, that Narain Singh was absent from the roll-call at which he was bound to be present at 7 p. m. and 8-30 p. m. on the 22nd February. The defence of the accused was that he was unable to be present at the first of the two roll-calls because he had been in the Court Inspector's office till 6-30 p. m. of that evening, and when he went home to get his food, was delayed because the food was not ready. As regards the second roll-call, he says he was asleep. He does not anywhere set up the defence that he was ignorant of the rule about the roll-call. The defence, moreover, is disbelieved, and we shall certainly not disturb the Magistrate's finding on these matters of fact. The finding proceeds upon evidence, with which he was more competent to deal, in that it was given in his presence, and he had better opportunities of appraising its worth. There is also much force in what the District Magistrate says, that he tried the offence summarily, and all that a Magistrate trying the case summarily is required by law to enter is the finding, and in case of a conviction, a brief statement of the reasons therefor. We do not expect to find the evidence in full, nor can we lay down,

(1) (1898) I L R, 15 All, 192

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for that would be legislation, that in a case of this kind the Magistrate is bound to do more than record a judgment embodying the substance of the evidence.

But it is contended that the Magistrate had no jurisdiction to try this case, and the contention is based upon the words contained in section 556 of the Code of Criminal Procedure. The argument is that the accused should not have been tried by the District Magistrate in one capacity for breach of an order issued by, or approved of by himself in another capacity as accused's superior officer. We have in this Court in Full Bench decided what meaning is to be put on the words "a party or personally interested," and that judgment is in no way affected by the explanation which has been added by Act No. V of 1898, certainly so far as the circumstances of this case are concerned. The accused could have at a proper stage raised this point; he did not do so, nor do we think he could have done so successfully, for we see in the case no substantial interest giving rise to real bias in the mind of the District Magistrate. We do not agree with the learned Judge that the fact that the District Magistrate was much concerned or account of riots between the police and the Madras Infantry Regiment, and that he was taking energetic steps to prevent disturbance of the public peace, is any evidence of any bias on the part of the District Magistrate. Any such conclusion as this we most emphatically decline to draw. A Magistrate may be very properly interested in securing the proper peace of his district, and be at the same time rigidly impartial in trying persons charged with a breach of that peace. The Code of Criminal Procedure recognises this when it gives the District Magistrate special powers of dealing in appeal with proceedings taken to insure security against any breach of the peace. The order therefore which we are now passing is in no way concerned with any such reasoning as that given above. We take into consideration that the accused was a recruit, that nothing was shown against his previous character. Three months is the maximum punishment provided by law, and we think that, on the whole, a sentence of one month's rigorous imprisonment would have sufficed. We accordingly reduce the sentence to one of rigorous imprisonment for one month with effect from the 28th February, 1900.

Any imprisonment which the accused has suffered since that date will be deemed part of this sentence. Any balance of imprisonment not suffered will run from the date on which he is arrested or submits himself for arrest.

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APPELLATE CIVIL.

1900

May 14

Before Mr Justice Burkill and Mr Justice Henderson

NAJM-UN-NISSA (PLAINTIFF) v AJAIB ALI KHAN (RESPONDENT)*

Muhammadan law—Pre-emption—Invalid sale—Time when right of pre-emption arises

No right of pre-emption arises upon a sale which, according to Muhammadan law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold, but if such sale becomes complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of sale. *Bayan v Muhammad Yaqub* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Rasool* and Pandit *Moti Lal* for the appellant.

Mr. *Karamat Husain* for the respondent.

HENDERSON J. (BURKITT, J., concurring).—These second appeals, No. 631 of 1897 and No. 687 of 1897, have been heard together.

The facts are very simple. One Aminullah, who was the owner of one of four adjacent houses, on the 17th May 1895, by a registered contract of sale, sold that house to Ajaib Ali, the respondent in this appeal, for Rs. 81 for the site, and a further sum for the buildings, to be ascertained by carpenters or masons to be appointed by the vendor and vendee, it being stipulated that upon the additional sum being ascertained and paid, possession of the house should be made over within ten days.

On the 14th July 1896, Abrar Husain, the owner of the remaining three houses, sold them to his wife, Najm-un-nissa, the

* Second Appeal, No. 631 of 1897, from a decree of D. P. Addis, Esq., C S., District Judge of Shahjahanpur, dated the 2nd August 1897, reversing a decree of Babu Baij Nath, Subordinate Judge of Shahjahanpur, dated the 3rd June 1897.

(1) (1894) L. L. R. 16 All, 344.

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present appellant. It so happened that Aminullah did not carry out the terms of his contract with Ajaib Ali, refusing to join in appointing carpenters or masons to ascertain the price of the buildings, and the latter found it necessary to institute a suit for specific performance of the contract, and eventually obtained a decree on the 13th May 1893, whereby, *inter alia*, it was directed that the parties to the suit should within a month join in nominating four carpenters or masons to ascertain the value of the buildings, and that in default of their so doing, the Court Amin should ascertain the value. The parties did not carry out the first direction, and the Amin subsequently made an inquiry and ascertained the value to be Rs. 111-8-0. This sum Ajaib Ali paid on the 15th August 1893, and thereafter, on the 6th September 1893, he obtained possession under the decree. Neither the contract of the 17th May 1893 nor the decree in the suit for specific performance are upon the record, but the facts, as above stated, are admitted.

Najm-un-nissa and Ajaib Ali have now each sued the other, each claiming to have a right of pre-emption against the other. Both suits were filed on the 22nd February 1897. Najm-un-nissa in her suit alleged that the proprietary right or ownership in the house purchased by Ajaib did not pass to him on the execution of the contract of the 17th May 1893; and that on the date of her purchase, namely, on the 14th July 1896, he was not the owner, and in fact did not, according to Muhammadan law, become the owner until the 6th September 1896, when he got possession, and she claimed that her right of pre-emption against him then arose.

Ajaib Ali in his suit claimed to have been the owner of the house purchased by him as from the 17th May 1893, the date of the purchase by him, and, as such, to have been entitled to pre-emption as against Najm-un-nissa upon her purchasing her house on the 14th July 1896. In the other suit he contended that Najm-un-nissa could have no right of pre-emption against him, as her purchase was long after his.

The first Court decided in favour of Najm-un-nissa's contention and dismissed the suit of Ajaib Ali. On appeal the District Judge dismissed both suits.

Both have now appealed to this Court. The only questions argued before us were as to the effect, according to Muhammadan Law, of the contract of sale of the 17th May 1895. Mr. *Abdul Rasool*, who appeared for Najm-un-nissa, contended—(1) that the contract of sale to Ajaib Ali was what is known to the Muhammadan Law as an invalid sale; (2) that no right of pre-emption can be claimed by or against the purchaser under an invalid sale so long as the invalidating circumstances or conditions exist; (3) that the sale to Ajaib Ali did not become complete until he obtained possession on the 6th September 1896, and that until that date the proprietary interest of his vendor did not pass to him. He has referred us to the case of *Begam v. Muhammad Yakub* (1), a case decided by a Full Bench of this Court, and to a large number of authorities on Muhammadan Law. The case referred to is an authority for the proposition that in considering whether a right of pre-emption arises the Muhammadan Law is to be applied, and that if there is a complete sale under that law, although not under the general law, the right of pre-emption will arise. It is also an authority for the proposition that the sale to Ajaib Ali was complete on the 6th September 1896, when the price had been paid and possession given to him; but it is not an authority, unless perhaps impliedly, upon the question whether the ownership in the house purchased by Ajaib did or did not pass to him as from the date of his purchase.

In support of the contention that the contract of sale of the 17th May 1895 was an invalid sale, a number of passages from Baillie's Muhammadan Law of Sale and other text-books on Muhammadan Law have been referred to. In Baillie's Muhammadan Law of Sale at p. 4, dealing with the conditions necessary to the validity of sale, it is said: (it is required) "thirdly, that "both the thing sold and the price be so known and determined as "to prevent dispute between the parties, and any ignorance that "may tend to produce contention between them is sufficient to "invalidate the sale, as in the case of a single goat undefined from "a particular flock, or of *anything at a price to be fixed by "another person.* * * * Fifthly, it is necessary to the validity "of all sales that they be free from vitiating or invalidating

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(1) (1894) I. L. R., 16 ALL., 344.

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"conditions which are of various kinds. * * They may be described generally in this place as conditions that are not in harmony with the contract or within the usual scope of such transactions among men, or conditions that are dependent on events that are either altogether fortuitous, or the time of the occurrence of which cannot be predicted with any degree of certainty."

The original text from which the former portion of the passage quoted has been taken with its translation is as follows:—

و منها ان يكون المبيع معلوماً والتمن معلوماً علماً بمنع من المنازعة
فبيع المجهول جهالة نقضي اليها غير صحيح كبيع شاة من هذا القطيع و بيع الشيء
بقسمة و بحكم فلان *

عالمگیری جلد ثالث کتاب البیوع باب اول صفحہ ۳ - طبع نولکشور *

(Alamgiri, Vol. III, p. 3, Lucknow edition.)

"One of them (the conditions of the validity of sale) is that the thing sold and the price be so known as to avoid any dispute, hence the sale of a thing so unknown as to lead to dispute is invalid; for example, the sale of any goat in a particular flock and the sale of a thing for its price (whatever it may be) or (for such a price) as such an one may settle."

In Baillie's Moolhummudan Law of Sale, at p. 176, it is said:—"Any ignorance of the thing sold or of the price that affords room for objection to its delivery prevents the legality of sale;" and again at p. 208:—"When delay is stipulated for in the delivery of the thing sold and the thing is specific the contract is invalid." In Hamilton's Hodaya, edition 1870, at p. 242, it is said:—"It is here proper to observe that every species of uncertainty which may prove an occasion of contention is invalid in a contract of sale."

Having regard to these authorities, it appears to us that the contract of the 17th May 1896 amounted to an invalid sale. The price was not so known or determined as to prevent dispute; the contract was for the sale of a house at a price to be fixed by third parties; the delivery of possession was indefinitely delayed, being dependent upon the ascertainment at some future time of the value of the buildings.

Mr. *Karamat Husain*, who appeared for *Ajaib Ali*, did contend that the sale was of the category of operative sales, but such sales are defined as "sales which take effect immediately" Baillie's *Moohummudan Law of Sale*, p. 6; Baillie's *Digest of Moohummudan Law*, p. 481 (6), but he was forced to concede that in its inception, at all events, it was an invalid sale.

If then the sale was an invalid sale, there are numerous passages in the *Muhammudan Law books* which show that such a sale cannot give rise to a claim for pre-emption by or against the purchaser so long as the invalidating circumstances exist. It is sufficient to refer to the following:—"The privilege of *Shaffa* cannot take place regarding a house transferred by an "invalid sale"—Hamilton's *Hedaya*, p. 650. "There must also "be an entire cessation of all right on the part of the seller. "There is therefore no right of pre-emption for an invalid sale"—Baillie's *Digest of Moohummudan Law*, p. 477.

و منها زوال حق البائع فلا تجب الشفعة في الشراء فاسداً *

عالمگیری جلد رابع الشفعة باب اول صفحه ۳ - طبع نولکشور *

Alamgirī, Vol. IV, p. 3, Lucknow edition. Book on Pre-emption, Chapter I.

"And one of them (the conditions of pre-emption) is the "extinction of the vendor's title, hence the (right of) pre-emption "does not arise in an invalid sale." "The right of pre-emption "arises only when the contract transferring the right of property "from the vendor to the vendee has become complete. A mere "executory contract does not give rise to a right of pre-emption. " * * * Nor does the right take effect in respect of a transfer "made under an invalid sale, for the transferor under such a sale "maintains all his rights intact, and so long as he has not "delivered the property to the purchaser can exercise his right "of pre-emption over the transfer of an adjacent property"—*Syed Ameer Ali's Muhammadan Law*, 2nd edition, p. 591.

The reason for the rule that a right of pre-emption does not arise upon an invalid sale is that the ownership of the vendor in the property sold must be extinguished before the right can arise. One of the conditions of *Shaffa* is that "there must be a cessation "of the seller's right in the subject of the sale." Baillie's *Digest*

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of Muhammadan Law, p. 476. So long as the proprietary right has not passed under a contract of sale from the vendor to the vendee, the vendor may himself claim a right of pre-emption against the purchaser of an adjacent tenement. This is clear from the following passage in the Fatwa Alamgiri:—

اگر مشتری نے بطور فاسد خریدی ہوئے دار کو اپنے قبضہ میں کر لیا حتیٰ کہ اُسکا مالک ہو گیا پھر اُس دار کے پہلو میں دوسرا دار فروخت کیا گیا تو مشتری کو سفع حاصل ہوگا پس اگر اُس نے ہلوز دوسرے دار کو شفع میں نہ لیا تھا کہ اُسکے بائع نے اُس دار مبیعہ کو بوجہ فساد بیع کے واپس کر لیا تو مشتری کو دوسرے دار کے لینے کا اختیار نہ ہوگا اور اگر مشتری دوسرے کو بحق شفع لے چکا ہو پھر اُسکے بائع نے اُس سے دار مبیعہ بحکم فساد بیع واپس لیا تو بحق شفع لینا برقرار کہا جائیگا۔ یہ مکیط میں ہے *

Alamgiri, Vol. IV, p. 5, Lucknow edition:—

“The purchaser of a house sold under an invalid sale took possession of it, whereby he became its owner. Then if a house adjacent to that house was sold the purchaser would have the right of pre-emption.

“If prior to his acquiring the second house by pre-emption his vendor took back the house sold to him owing to the invalidity in the sale, the purchaser will not then have a right to take the house by right of pre-emption.

“If the vendor takes back the house by reason of its invalidity after the vendee has acquired the second house by pre-emption, then the acquisition (of the house) by pre-emption will not be disturbed. This is in Mokeet.”

But in the case of an invalid sale the right of pre-emption arises when the contract transferring the property becomes complete by possession being given. According to the Hedaya, “in case of invalid sale, the purchaser becomes proprietor of the article upon taking possession of it, and is responsible for it, if it be lost in his hands”—Hedaya, p. 267. The same principle is also laid down in the following passage from the Fatwa Alamgiri:—

واما شرائط الصحة فاعلمه و خاصة فالعلمه لكل بيع ما هو شرط الانعقاد لان مالا ينعقد لم يصح ولا ينعكس فان الفاسد عندنا منعقد ناذ اذا اتصل به القبض *

عالمگیری جلد دہم کتاب المیراث باب اول صحت ۳ طبع نولکھنؤ

Alungiri, Vol. III, p. 3, Lucknow edition: The same as above. Chapter I.

"And the conditions of the validity (of the sale) are either 'general or special. The general condition is that of an 'absolute sale' that which is the condition of the constitution (of the sale) 'because what is not constituted is not valid, and the contrary 'is not true, because according to us an invalid sale is constituted 'and takes effect when possession is joined with it."

So in Baillie's Muhammadan Law of Sale it is said:—"An 'unlawful sale is that which takes effect when followed by possession of the thing sold" (p. 7).

Having regard to the authorities quoted above, we are of opinion that the sale of the 17th May 1895 was an invalid sale; that the ownership in the subject of the sale did not pass to Ajab Ali on the date of the contract, nor until the 8th September 1896, when he, on payment of the price, obtained possession.

On behalf of Ajab Ali it has been contended by Mr. Karamat Hussain that sale is completed by declaration and acceptance, that is to say, when the offer of the vendor has been accepted by the vendee; and he has referred us to the Hedaya, p. 241. The passage, however, appears to refer to the constitution of the contract of sale, and has no reference to the conditions necessary to its validity. With regard to the constitution of the contract of sale, there is no material difference between the Muhammadan and other systems of law. The contract, whether the sale be a valid or invalid sale, is complete, in the sense of the agreement being concluded, upon the offer of the seller being accepted by the purchaser.

In the case of a valid sale there is clear authority to show that ownership passes before delivery of possession. "The legal 'effect of sale is to establish a right of property in the buyer to 'the thing sold and in the seller to the price when the sale is 'absolute," i.e., absolute as distinguished from dependent (with an option) or invalid. Baillie's Muhammadan Law of Sale, p. 7. See Hamilton's Hedaya, p. 553, where it is said:—"If the 'Shafiee bring the seller into court whilst the house is still in his

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“possession, he (the Shafee) may commence his litigation against him, and the seller may retain the house in his own possession until he receive the price from the Shafee. The Kazee, however, is not in this case to hear the evidence until the purchaser also appear, as for his presence there is a twofold reason; for, first, the purchaser is proprietor of the ground, and the seller the possessor; and as the decree of the Kazee must be against both, both therefore must be present. (It is otherwise where the purchaser has obtained possession: for then there can be no occasion for the presence of the seller, as he has become like a stranger, having neither the property nor the possession.)”

In the case of an invalid sale we have seen that the purchaser becomes the proprietor of the thing sold on taking possession of it: but it has been contended that he becomes owner as from the date of the original contract, and in support of this contention we have been referred to a number of texts. All these texts, however, deal with cases of sale, with an option. The general rule appears to be that “when an option is reserved to the seller the right of property in the thing sold does not pass from him, but such right in the price passes from the purchaser;” and “when the option is reserved to the purchaser the right of property in the price does not pass out of him, but the thing sold passes from the seller.” See Baillie’s Muhammadan Law of Sale, pp. 67-68. To take the case of an option reserved to the seller, the sale on principle, so far as he is concerned, is otherwise a valid or out-and-out sale, and therefore the right of property passes from him as in the case of an ordinary valid or out-and-out sale.

It is a well recognized principle that there must be a cessation of the seller’s ownership in the thing sold, an ownership in the pre-emptor “*at the time of the purchase* in the mansion on account of which he (the pre-emptor) claims the right of pre-emption”—Baillie’s Digest, pp. 476-477. That there is no such cessation of the seller’s ownership in the thing sold and ownership in the purchaser at the time of a contract of invalid sale seems to be clear from the fact that so long as the vitiating circumstances are not removed it is the seller, and not the purchaser, who is entitled to pre-emption in the case of a subsequent

sale of an adjoining tenement. The text quoted from the Alam-giri, Vol. IV, p. 5, to which we have already referred, seems to leave no doubt upon the point. That text seems also to show that when on the vitiating circumstances being removed, as by possession, an invalid sale becomes complete, the ownership does not pass from the seller to the purchaser as from the date of the sale.

The result is that we must find, firstly, that Ajaib Ali did not become the owner of the house purchased by him until the 6th September 1896, and therefore he was not entitled to claim pre-emption against Najm-un-nissa when she purchased her houses on the 14th July 1896; secondly, that Najm-un-nissa was entitled, on the sale to Ajaib Ali becoming complete on the 6th September 1896, to claim pre-emption against him. Accordingly we allow the appeal of Najm-un-nissa and dismiss that of Ajaib Ali. Najm-un-nissa will have her costs of both appeals.

Appeal decreed.

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Before Mr. Justice Banerji and Mr Justice Aikman.

DAMODAR DAS (PLAINTIFF) v. MUHAMMAD HUSAIN (DEFENDANT) *

Act No IX of 1872 (Indian Contract Act), sections 135, 137—Principal and Surety—Agreement to give time to principal debtor—Gratuitous agreement—Surety not discharged

A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect an agreement to give time to the principal debtor must amount to a contract, that is, there must be consideration therefor. *Philpot v. Briant* (1), *Tucker v. Lang* (2), and *Clarke v. Birley* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, for the appellant.

Maulvi Ghulam Mujtaba, for the respondent.

BANERJI and AIKMAN, JJ.—The question which arises in this appeal is whether the defendant Muhammad Husain, who was surety for the defendant Wali Ahmad, was discharged

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* Second Appeal No 22 of 1898 from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 29th September 1897, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 24th February 1897.

(1) (1828) 4 Bing, 717 (2) (1856) 2 K and J, 745.
(3) (1888) L R. 41, Ch. D 422.

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under section 135 of the Indian Contract Act. What happened was this. Wali Ahmad had written a letter to the plaintiff, asking for time to pay the instalments which were payable by him. In reply to that letter the plaintiff wrote to say :—"If there is no legal impediment, then I agree; if there is, then I do not agree." It was contended in the lower appellate Court that this was a conditional acceptance of the proposal of the principal debtor. The learned Judge overruled this contention, and held that by reason of the creditor, plaintiff, accepting the proposal to grant time to the principal debtor the surety was discharged. It is contended before us, and in our opinion rightly, that a mere agreement between the creditor and the principal debtor does not discharge the surety unless the agreement amounts to a contract, that is, unless the agreement is one enforceable by law at the instance of the debtor. An agreement is not enforceable by law unless there is consideration for it. In this case there was no consideration for the plaintiff's agreement to delay the realization of the instalments originally fixed. This agreement was nothing more than a mere gratuitous forbearance on the part of the creditor within the meaning of section 137 of the Contract Act. Under section 133 the liability of the surety would cease if there was a contract between the creditor and the principal debtor by which the creditor promised to give time to the principal debtor. The real test for the application of that section is whether the agreement became a contract, that is to say, whether there was consideration for the promise made in the agreement. In the absence of such consideration the agreement could not be enforced by the debtor. The cases of *Philpot v. Briant* (1), *Tucker v. Living* (2), and *Clarke v. Birley* (3), which were cited at the hearing, entirely support the contention of the learned counsel for the appellant. It was not suggested in this case that section 139 of the Contract Act had any application. For the above reasons we are unable to agree with the Courts below in holding that the surety was discharged by reason of the forbearance of the plaintiff to realize the instalments payable by the principal debtor. We allow this appeal and vary the decree of the Court below by setting

(1) (1828) Bing., 717.

(2) (1856) 2 K. and J., 745.

(3) (1838) L. R. 41, Ch. D., 422.

aside that portion of the decree which dismissed the claim against Muhammad Husain with costs, and we decree the claim against the said defendant with costs here and in the Courts below, and direct the property hypothecated by the said defendant to be sold for the realization of the amount decreed, together with interest at the rate of 6 per cent. per annum up to the date of realization, unless the amount payable under the decree is paid on or before the 15th November, 1900. Our decree will be drawn up in the terms of section 88 of the Transfer of Property Act.

Decree modified.

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Before Mr. Justice Burkitt and Mr. Justice Aikman.

DEBI SAHAI (DEFENDANT) v SHEO SHANKER LAL AND ANOTHER
(PLAINTIFFS) *

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May 19.

Hindu law—Mitakshara—Stridhan—What constitutes Stridhan—Property inherited from a female—Descent of Stridhan.

Amongst property which becomes *stridhan* according to the law of the Mitakshara is property inherited from a female.

It is not the case that where such *stridhan* has once devolved according to the law of succession which governs the descent of this peculiar species of property it ceases to be ranked as *stridhan* and is ever afterwards governed by the ordinary rules of inheritance. *Thakoor Deyhee v Rai Baluk Ram* (1), *Bhugwandeon Doobey v. Myna Bae* (2), *Chotay Lall v Chunno Lall* (3), *Phukar Singh v Ranjit Singh* (4), and *Muttu Vaduganatha Tevar v. Dora Singha Tevar* (5), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandar Mukerji*), for the appellant.

Pandit *Sundar Lal* and Munshi *Haribans Sahai*, for the respondents.

AIKMAN, J. (BURKITT, J., concurring).—This is an appeal brought by the defendant to a suit instituted by the plaintiffs-respondents to recover possession of landed property of considerable value together with mesne profits, and for invalidation

* First Appeal No. 46 of 1898, from a decree of Maulvi Saiyid Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated 7th December 1897.

(1) (1866) 11 Moo., I. A., 139.

(3) (1876) L. R., 6 I. A., 15.

(2) (1867) 11 Moo., I. A., 487.

(4) (1878) I. L. R., 1 All., 661.

(5) (1881) I. L. R., 3 Mad., 290.

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of a deed of gift, dated the 8th October 1882, executed in favour of the defendant by one Musammat Dilla Kunwari. According to the plaint Dilla Kunwari had only a life interest in the property. She died on the 25th September 1895, and the plaintiff's case is that with her death any interest which her donee, the defendant, had in the property, determined.

The property in suit at one time belonged to Bhawani Dayal and Basant Lal, two brothers, members of a joint Hindu family. Bhawani Dayal died in 1851, leaving him surviving two widows, Kishen Kunwari and Dilla Kunwari, and a daughter by Kishen Kunwari named Jado Nath Kunwari. On Bhawani Dayal's death the property passed by right of survivorship to his brother Basant Lal, who died in 1859, leaving two widows, but no issue. These widows, who had entered into possession of the estate, both died in 1861. On their death the widows of Bhawani Dayal in some unexplained manner got possession of the estate in equal moieties, although it is admitted the title to it devolved on the nearest reversioners, Hanuman Prasad and Hanwant Prasad. The latter died in 1865, and his rights in the estate passed to his son Debi Prasad. On the 8th September 1866, Debi Prasad and his uncle Hanuman Prasad executed a deed of gift of the whole estate in favour of Musammat Jado Nath Kunwari, daughter of Bhawani Dayal. At that time Jado Nath's mother, Kishen Kunwari and Kishen Kunwari's co-widow Dilla Kunwari, were in possession in equal shares. Jado Nath's mother died in 1869, and Jado Nath then got possession of half of the estate. In 1870, Jado Nath Kunwari brought a suit against Dilla Kunwari and one Ram Manorath Lal, in whose favour Dilla Kunwari had executed a deed of gift to recover possession of the rest of the property. The Court of first instance decreed Jado Nath's claim for possession of all the property save eleven villages. As to these the decree declared that Dilla Kunwari would remain in possession for her lifetime without power of alienation. On appeal this Court reversed the decree of the first Court so far as it decreed to the plaintiff possession of any part of the property, and dismissed the suit, but with the declaration that any transfer or alienation made by Dilla Kunwari to Ram Manorath Lal was not to take effect against the reversioners. The defendant-appellant, in whose favour Dilla Kunwari

executed the second deed of gift which this suit seeks to invalidate, is the son of Ram Manorath Lal abovementioned. Jado Nath Kunwari died in 1879, and it is admitted that on her death her rights in the property in suit passed to her daughter Jagarnath Kunwari, who died on the 13th November 1896. The plaintiffs are the sons of Jagarnath Kunwari, and claim that the right to the property in suit devolved on them on their mother's death.

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The lower Court decreed the plaintiff's claim, and against that decree the present appeal has been brought by defendant. For the appellant it is contended, in the first place, that the deed of gift executed by Hanuman Prasad and Debi Sahai in favour of Jado Nath Kunwari, plaintiff's predecessor in title, is bad as being the gift of merely a contingent interest. We are of opinion that there is no force in this plea, as the succession of the donors opened up on the death of Basant Lal's widows, and their interest then ceased to be contingent. It is next contended that Musammamat Dilla Kunwari, through whom the appellant claims, had acquired by adverse possession a complete title to the property. We are of opinion that in the face of the judgment of this Court, dated 19th April 1871, a judgment in a suit between the predecessors in title of the parties before us, and of the subsequent judgment of this Court dated 4th July 1883, also a judgment *inter partes*, in which the effect of the decree of 1871 was considered, this is a position which cannot successfully be maintained, it having been clearly held in these judgments that Musammamat Dilla Kunwari had only a life-interest in the property.

A third and more formidable objection taken by the defendant is that the plaintiffs are not competent to maintain the suit.

It is admitted that the property in suit, having been conveyed by gift to the plaintiff's grandmother Jado Nath Kunwari, became her *stridhan*, and was inherited by her daughter Jagarnath Kunwari, mother of the plaintiffs. If it was *stridhan*, in the hands of Jagarnath Kunwari it is admitted that the plaintiff's suit cannot succeed, as the property would in that case pass on Jagarnath Kunwari's death, not to the plaintiffs but to the plaintiff's sisters, who, it is admitted, are alive. The question then, which

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we have to consider, is whether the property in suit was Jagannath's *stridhan*. This question, which is by no means free from difficulty, has been the subject of long and learned argument at the bar.

For the appellant the text of the Mitakshara, Chapter II, section 11 §2, which includes amongst woman's property property which a woman has acquired by inheritance, is relied on.

If the plain meaning which the words bear is to be given to this passage, there is no doubt that the appellant is entitled to succeed.

On the part of the respondents, reliance is placed on a passage in McNaghten's Principles and Precedents of Hindu Law (p. 38, 3rd edition), to the effect that *stridhan* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance, and on certain decisions of the Calcutta and Madras High Courts in which this view has been adopted and given effect to.

The Mitakshara, however, is the paramount authority which governs such questions in these provinces, and we are unable to find in it any warrant for the opinion expressed by Sir William McNaghten, who does not cite any authority for the view which he expresses. It is true that he says that "in the Mitakshara "whatever a woman may have acquired, whether by inheritance, "purchase, partition, seizure or finding, is denominated woman's "property, but it does not constitute her *peculium*." But, as Messrs West and Buhler have demonstrated (Hindu Law, 3rd edition, p. 146, etc.), no such distinction between *stridhan* and what Sir W. McNaghten calls a woman's *peculium*, was present to the mind of the author of the Mitakshara. As to this see also Bannerjee's Hindu Law of Marriage and Stridhana, 2nd edition, p. 276.

The doctrine that *stridhan* which has once passed by inheritance ceases to be *stridhan* is apparently derived from the Daya Krama Sangraha of Sri Krishna Tarkalankara. This work is described by Mayne as "very modern, its author having lived in the beginning of the last century." It, like the Daya Bhaga, is of high authority in the Bengal school, but it has

never, so far as we know, been recognized as of any authority in the Benares school.

Mayne, in his "Hindu Law and Usage," considers that the author of the Mitakshara included in the term *stridhanum* property which a woman has acquired in any way whatever. But he is of opinion that the special line of descent of such property set forth in section 11 of the Mitakshara does not apply to property which a woman has inherited from a male, that having already been treated of in earlier sections. He is also of opinion that there is no reason why the author of the Mitakshara should not have included in the property for which in section 11 he prescribes a special line of descent property inherited from a female.

The question whether, according to the Mitakshara, property inherited from a female should be subject to the special rules of descent governing *stridhan* has not formed the subject of judicial consideration, either in the Privy Council or in this Court. But, so far as can be gathered, the views of their Lordships of the Privy Council are quite consistent with the opinion expressed by Mayne. The cases of *Thakoor Deyhee v. Rai Baluk Ram* (1) and *Bhugwundeen Doobey v. Myna Bae* (2) dealt with property which a woman had inherited from her husband, and the case of *Chotay Lall v. Chunno Lall* (3) with property inherited by a daughter from a father. A case in this Court, *Phukar Singh v. Runjit Singh* (4) had to do with property inherited by a grandmother from her grandson. In all these cases it was held that the woman took only a restricted interest, and that on her death the property passed to the heirs of the last male owner.

In the case *Muttu Vaduganadha Tevar v. Dora Singha Tevar* (5) it was contended that a zamindari property inherited by a daughter from her father was her *stridhan*, and passed to her heirs on her death; and reliance was placed on what is called the much-discussed passage in the Mitakshara, Chapter II, section 11 §2. As to this their Lordships of the Privy Council remark at p. 301 of the judgment:—"It is not necessary now to state in any detail how impossible it is, whether with regard to other commentators or to other passages of the Mitakshara itself, to

(1) (1866) 11 Moo, I A, 139.

(2) (1857) 11 Moo, I A, 487.

(3) (1876) L R, 6 I. A, 15.

(4) (1878) 1 L R, 1 All, 661.

(5) (1881) 1 L R, 3 Mad, 230.

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"construe this passage as conferring upon a woman taking by "inheritance from a male a *stridhan* estate transmissible to her "own heirs." As the text in the Mitakshara refers to acquisitions by inheritance in general, the insertion by their Lordships of the words "from a male" in the passage above cited from their judgment is significant, and, as said above, is an indication that the views of the Privy Council are not inconsistent with the opinion expressed by Mr. Mayne.

In the Bombay Presidency, save in the case of a widow succeeding to her husband, it is held that property which a woman takes by inheritance is her *stridhan*, and passes to her heirs.

In this state of the authorities, and in the absence of any authority to the contrary, which is binding upon us, we arrive at the conclusion that the estate which the mother of the plaintiffs inherited from her mother was *stridhan*, governed by the special rules of devolution applicable to this species of property. The sisters of the plaintiffs therefore and not the plaintiffs are entitled to succeed to it. We accordingly sustain the first ground set forth in the memorandum of appeal, and holding that the plaintiffs are not competent to maintain the suit, set aside the decree of the lower Court and dismiss the suit with costs in both Courts.

Appeal decreed.

1900

May 21.

Before Mr Justice Banerjee

THAKUR RAM (DECREE HOLDER) v KATWARU RAM (JUDGMENT-DEBTOR) *
Execution of decree—Limitation—Act No XV of 1877—(Indian Limitation Act), S h v, Art 179 (4)—Application to take some step in aid of execution—Payment of process fee.

The mere payment of process fee for the issue of notice for the purpose of an inquiry under s 287 of the Code of Civil Procedure, or the payment of costs for the issue of a proclamation of sale, unaccompanied by any application, will not operate to give a fresh starting point for limitation within the meaning of art. 179 (4) of the second schedule to the Indian Limitation Act, 1877. *Har Sahai v Sham Lal* (1) and *Dwarkanath Appaji v Aravind Rao Ramchandra* (2) followed. *Barmho Nand v. Sarbishwara Nand* (3) distinguished. *Radha Prosad Singh v. Sundar Lall* (4) dissented from.

*Second Appeal No 772 of 1899, from a decree of Munshi Achul Behari, Officiating Additional Subordinate Judge of Ghazipur, dated the 23rd June 1899, reversing a decree of Chaudhri Saiyid Abdul Husain, Munsif of Ghazipur, dated the 11th April 1899.

(1) Weekly Notes, 1900, p 88.

(3) Weekly Notes, 1883, p. 217.

(2) (1894) I. L. R., 20 Bom., 170.

(4) (1883) I. L. R., 9 Calc., 644.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Racof* and Maulvi *Muhammad Ishaq*, for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondent.

BANERJI, J.—This appeal arises out of the execution of a decree passed under section 88 of the Transfer of Property Act on the 19th November, 1890. An order absolute was made under section 89 on the 11th September, 1894. The first application for execution was presented on the 29th November, 1895. The present application was made on the 7th December, 1898. The question is, whether the application last mentioned was within time. The lower appellate Court has held that it was barred by limitation, and it is contended that this decision is incorrect. The learned vakil for the appellant relies on the fact that on the 24th December 1895, process fee was deposited for the issue of a notice for the purpose of an inquiry under section 287 of the Code, and also upon the fact that on the 8th July 1896, costs for the issue of a proclamation of sale were deposited. He contends that limitation should be computed from these dates, and that as the present application was made within three years from both of these dates, it was not time-barred.

Under cl. 4 of art. 179 of the second schedule to the Indian Limitation Act, 1877, the three years' limitation must be computed from the date of applying in accordance with law for execution of the decree, or to take some step in aid of execution. It is clear that under that article a fresh start for the computation of limitation is allowed, not from the date of taking a step in aid of execution, but from the date of applying to take some step in aid of execution. The record of this case shows that no application, either oral or in writing, was made when the deposit of process fee and of costs of sale was made on the 24th December 1895, and the 8th July, 1896. The mere fact of the making of the deposit cannot amount to the making of an application within the meaning of art. 179 (4). The learned vakil for the appellant relies on the ruling of this Court in *Barmha Nand v. Sarbishwara Nand* (1). In that case what the learned Judges said was

(1) Weekly Notes, 1883, p 217.

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that "the decree-holder applied within the period of limitation for steps to be taken in execution when he deposited the necessary fees for notices and advertisements of sale." From this statement it seems that some application was made in that case. In the recent case of *Har Sahai v. Sham Lal* (1), it was held that payment into Court of postage for the purpose of getting a record forwarded to another Court in a case where the transfer of a decree for execution had been ordered under section 223 of the Code of Civil Procedure did not amount to an application to the Court to take a step in aid of execution. In *Dwarkanath Appaji v. Anandrao Ramchandra* (2), it was held that the mere deposit of process fee for the service of notice was not an application within the meaning of art. 179, cl. (4), which could save the operation of limitation. The case of *Radha Prosad Singh v. Sunder Lal* (3) is no doubt an authority in favour of the appellant's contention, but in that case the learned Judges overlooked the fact that under cl. (4) of art. 179 there must be an application to take a step in aid of execution in order to save the operation of limitation, and that the mere fact of a step being taken in aid of execution cannot have that effect. I am therefore unable to agree with the ruling last mentioned. As in this case the decree-holder did not apply for execution or to take a step in aid of execution within three years before the date of his present application for execution, that application was time-barred, and this appeal must fail: it is dismissed with costs.

I may observe that the lower appellate Court was wrong in stating that notice under section 248 was issued on the 24th December, 1895. If that date had been correct the present application might have been within time; but, as a matter of fact, the order for the issue of notice was made on the 30th November 1895, and the notice was actually issued on the second December, 1895, and the present application was made beyond three years from both these dates.

Appeal dismissed.

(1) Weekly Notes, 1900, p. 88.

(2) (1894) I L. R., 20 Bom., 179.

(3) (1883) I. L. R., 9 Calc., 644.

Before Mr. Justice Banerji and Mr Justice Aikman.

NANKU RAM (PLAINTIFF) v THE INDIAN MIDLAND RAILWAY
COMPANY (DEFENDANT) *

1900
May 25.

Act No IX of 1890 (Indian Railways Act), sections 72, 76—Act No IX of 1872 (Indian Contract Act), sections 151, 152, 161—Contract—Bailment—Liability of bailee—Burden of proof—Railway Company.

Where goods are delivered to a railway company for carriage not "at owner's risk," and such goods are lost or destroyed while in the custody of the company, it is not for the owner suing for compensation for such loss or destruction to prove negligence on the part of the company, but, when the owner has proved delivery to the company, it is for the company to prove that they have exercised the care required by the Indian Contract Act, 1872, of bailees for hire.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* for the appellant.

The respondent was not represented.

BANERJI and AIKMAN, JJ.—The facts which gave rise to the suit were these. The plaintiff's agent consigned to the defendant company 30 bales of cotton for conveyance to Bakhtiarpur, a station on the East Indian Railway. Twenty-eight of the bales were loaded in a wagon on the 3rd January 1896, and the wagon was attached to a mixed train which left the Kirwi station on the same day a little after 4 P. M. After the train had been in motion about 40 minutes, it was discovered that the wagon containing the cotton bales was on fire. It is admitted that all the cotton loaded in that wagon was destroyed. In the present suit the plaintiff claims damages for the loss sustained by him in consequence of the destruction of the cotton. The defendant company did not dispute the amount claimed, but they claimed exemption from liability on three grounds: (1) that the plaintiff at the time of despatch elected to pay the owner's risk rate, (2) that the fire was the result of spontaneous combustion, and (3) that the fire was not the result of any negligence on the part of the company or its servants. On the first point the Court of first instance found against the defendant company, and that finding was never questioned. It must therefore be taken that the goods—so far as they were to be conveyed over the line of

* Second Appeal No 857 of 1897 from a decree of G Forbes, Esq., District Judge of Banda, dated the 16th August 1897, confirming a decree of Babu Sanwal Singh, Subordinate Judge of Banda, dated the 12th May 1897.

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the defendant company—were not at the risk of the owner. The Courts below have, however, dismissed the claim, holding that the defendant company was not liable. The lower appellate Court was of opinion that it was for the plaintiff to prove that the defendant company was guilty of negligence in respect of the bales of cotton consigned to it. The learned Judge says:—

“The party damaged has no cause of action unless he alleges negligence: such an allegation must not be a general sweeping one, but must be such as to give notice to the defendants of the case they will have to meet.” The learned Judge further adds:—

“Clearly a plaintiff must affirm some specific act of negligence, or suggest some such act: thus it was open to the plaintiff appellant in the present case to assert in his plaint that he believed the fire to have been caused either by sparks from the engine, or to have been caused by some fire left carelessly in the wagon before the bales were loaded into it, or by some person smoking while engaged in loading.” Being of that opinion the learned Judge held that the plaintiff had not proved that the defendant company were guilty of any act of negligence, and affirmed the decree dismissing the suit. We are unable to agree with the view of the law taken by the learned Judge. By section 72 of Act No. IX of 1890 the responsibility of a railway administration for the loss or destruction of goods delivered to it to be carried by railway is, subject to the other provision of the Act, that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. Section 76 of the Act provides that in any suit against a railway administration for compensation for loss or destruction of goods delivered to it for carriage, it shall not be necessary for the plaintiff to prove how the loss or destruction was caused. The passages quoted from the learned Judge’s judgment show that he overlooked the important provisions of section 76, which cast, not on the plaintiff, but on the railway company, the burden of establishing the circumstances which, under sections 151 and 152 of the Indian Contract Act, would exonerate the bailee from liability. It was sufficient for the plaintiff to prove delivery of the goods to the railway company and the fact that the goods were destroyed whilst in the custody of the company. Those facts being admitted in this case, it was for the company to establish

the circumstances which would entitle them to be relieved from liability. This the defendant company in this case failed to do. The Court of first instance says in its judgment that the fire must have been the result of spontaneous combustion. There is not a particle of evidence to show that this was so, and no such conclusion can be drawn from the evidence on the record. We may accept the evidence that the fire did not originate from a spark from the engine; but that alone does not lead to the conclusion that there was no other cause for the bales catching fire except the theory of spontaneous combustion. It appears from the note which the locomotive foreman recorded on the driver's report of the 25th January 1896, that, in his opinion, the wagon was on fire before it left Kirwi station. We may mention that the locomotive foreman happened to be travelling by the train to which the wagon was attached. If this was so, it was for the company to prove that the possibilities indicated by the learned Judge in his judgment as to the origin of the fire, namely, that of some fire having been left carelessly in the wagon before the bales were loaded into it, or of some person smoking whilst loading, did not exist, or that precautions were taken to prevent the originating of the fire in any of the ways indicated. It is true that the learned Judge in his judgment says that "upon the evidence on the record the lower Court's finding that the fire was due to spontaneous combustion and that the company's servants had not been guilty of negligence, was sound and proper." We may observe that this opinion as to the absence of negligence on the part of the defendant company and their servants is based on the erroneous view which the learned Judge entertained as to the burden of proof. We may further observe that the finding, to which we have referred above, is based on no evidence whatever on the record. The learned advocate for the appellant asked our leave to contend that there was no evidence whatever to justify the finding as to the fire being due to spontaneous combustion or as to the absence of negligence on the part of the defendants. We granted him the leave asked for, and we have gone carefully through the evidence. After having heard that evidence we can unhesitatingly say that there is no evidence to support the conclusion of the Courts below. The plaintiff was therefore ent

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to a decree for the amount claimed, the correctness of which was not disputed. We may mention that the railway company was not represented in the appeal before us, and that consequently the appeal has been heard *ex parte*. The result is, that we allow the appeal, and, setting aside the decrees of the Courts below, decree the claim as laid in the plaint with costs in all Courts and future interest. We direct that the future interest hereby awarded be calculated at the rate of 6 per cent. per annum from the date of suit till the date of realization.

Appeal decreed.

1900.
May 25.

Before Mr. Knox, Acting Chief Justice, and Mr. Justice Blair.
HIMANCHAL SINGH (JUDGMENT-DEBTOR) v. JHAMMAN LAL (DECREE-HOLDER).*

Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 205B—Court of Wards—Contract entered into by disqualified proprietor whilst his property was under the charge of the Court of Wards.

Section 205B of Act No. XIX of 1873 does not cease to have effect when property to which it might apply is released from the custody of the Court of Wards. Such property cannot at any time be taken in execution of a decree obtained on a contract entered into by a ward of the Court at a time when his property was under the superintendence of the Court.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Satya Chandar Mukerji) and Munshi Gulzari Lal, for the appellant.

Munshi Gobind Prasad for the respondent.

KNOX, ACTING C. J., and BLAIR, J.—The order passed by the learned Subordinate Judge is wrong. We do not know whether his attention was or was not drawn to section 205B of Act No. XIX of 1873. It is contended that the contracts out of which this decree issued were contracts entered into by the judgment-debtor while his property was under the superintendence of the Court of Wards. This contention was clearly placed before the learned vakil for the respondent and was not contested by him. We take it therefore that the contracts abovementioned were entered into at a time when Himanchal Singh was a ward of Court. If gentlemen of the money-lending profession will

* First Appeal No. 222 of 1899, from a decree of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 25th November 1899.

frustrate the object of the law by lending money to wards of Court, they have themselves to thank if they find that their money has been thrown away. Property while under the superintendence of the Court of Wards cannot, without the sanction of the Court, be in any way charged, nor can such property be taken in execution of a decree made in respect of contracts entered into by a ward of the Court while his property is under such superintendence. The contention that the restriction only remains in force so long as the property is under superintendence and is immediately removed the moment the superintendence ceases is not warranted by law.

To put it more clearly. Section 205B of Act No. XIX of 1873 in clear terms provides that no property which has been under the superintendence of the Court of Wards shall be liable to be taken in execution of a decree made in respect of any contract which was entered into by a disqualified person during the time while his property was under such superintendence. To limit the operation of the section to the exact moment when the property is released from the superintendence of the Court of Wards would defeat the manifest object of the Legislature. That intention was that persons whose property was under the superintendence of the Court should not be competent to create without the sanction of the Court any charge upon such property, and that, if they did execute any document purporting to create such charge, that document should at no time have any operation *quoad* the property supposed to be so charged. The whole aim and object of the Legislature would be frustrated if, while the Court of Wards was building up and nursing the estate, the disqualified proprietor should be left free to destroy the work of the Court.

The appeal is decreed, the judgment and decree of the lower Court are set aside, and the application for execution is dismissed with costs.

Appeal decreed.

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HIMANCHAI
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1900
May 26

Before Mr. Justice Banerji and Justice Aikman.

SHER SINGH AND ANOTHER (DEFENDANTS) v. DIWAN SINGH AND
OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 591—Appeal—Appeal from decree in suit, the grounds of appeal being solely directed against an interlocutory order in the suit.

Held, that no appeal would lie where, the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an interlocutory order passed in the suit. *Sheo Nath Singh v. Ram Din Singh* (1), followed.

THE plaintiffs in this case brought their suit claiming two distinct reliefs. On objection by the defendants that the two reliefs claimed could not be joined in one suit, the Court of first instance put the plaintiffs to their election and fixed a date upon which the plaintiffs were to appear and state which relief they wished to pursue in that suit. On the date fixed the plaintiffs did not appear, and the Court dismissed the suit as for default of appearance. Subsequently the plaintiffs applied for restoration of the suit, and their application was granted, the suit restored, and a decree ultimately passed in their favour. Against this decree the defendants appealed, both attacking the decree on the merits and questioning the procedure of the Munsif in restoring the case. The appeal was dismissed. The defendants thereupon appealed to the High Court; but in this appeal they attacked only the order of the Munsif, by which he restored the suit on the plaintiffs' application.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellants.

Mr. *W. K. Porter* and Babu *Satish Chandar Banerji* for the respondents.

BANERJI and AIKMAN, JJ.—We think that this appeal must be dismissed, and the preliminary objection taken by Mr. *Porter* must prevail.

The suit of the plaintiffs-respondents was dismissed by the Court of first instance for default. That dismissal was subsequently set aside, and the case heard on the merits, and a decree made in favour of the plaintiffs. An appeal preferred from that decree

* Second Appeal No. 960 of 1897 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 17th September 1897, confirming a decree of Maulvi Muhammad Shafi, Munsif of Koil, dated 24th December 1896.

(1) (1895) I. L. R., 18 All., 19.

was dismissed by the lower appellate Court. The defendants have appealed to this Court, and the only ground upon which their appeal is based is that the dismissal of the suit was improperly set aside by the Court of first instance. No objection has been taken to the decree of the lower appellate Court as regards the merits of the case.

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This case is clearly governed by the concluding remarks in the judgment of this Court in *Sheo Nath Singh v. Ram Din Singh* (1) at p. 22. It was there said that "section 591 contemplates two things, there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under section 591." It is conceded that in this case there is no appeal about anything else. The objections taken in the memorandum of appeal relate only to the order setting aside the dismissal of the suit.

Following the ruling referred to above, we sustain the objection urged on behalf of the respondents and dismiss this appeal with costs.

Appeal dismissed.

*Before Mr. Justice Banerji and Mr. Justice Aikman.**

JAFRI BEGAM (OPPOSITE PARTY) v. SAIRA BIBI (PETITIONER).

1900

June 1.

Execution of decree—Civil Procedure Code, section 234—Successive deaths of judgment-debtor and his legal representative—Execution against legal representatives of the legal representative.

The judgment-debtor under a simple money decree died before execution was taken out against him. Execution of the decree was sought against his legal representative, into whose hands it was found that certain of the assets of the deceased judgment-debtor had come; but before anything was recovered the legal representative, in turn, died. *Held*, that the decree-holder was entitled to execute his decree against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which might have come into her possession.

IN this case one Jafri Begam obtained a decree against Ezid Bakhsh in 1890. The decree was for Rs. 2,587. The judgment-debtor Ezid Bakhsh was a pensioned Government servant. He died before the whole of the decretal amount was realized. At his death there was a sum of Rs. 1,700 odd in deposit at the

* Second Appeal No. 43 of 1898, from a decree of B. Lindsay, Esq., District Judge of Jaunpur, dated the 18th November 1897, reversing an order of Rai Mata Prasad, Subordinate Judge of Jaunpur, dated the 8th May 1897.

• (1) (1895) I. L. R., 18 All., 19.

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Jabalpur treasury, arrears of pension which had not been drawn by Ezid Bakhsh. Execution of the decree was then sought as against Muhammad Ibrahim, son of Ezid Bakhsh. He contested the application, urging that Jafri Begam's decree being held in attachment by him was not capable of execution, and further pleading that he was not liable to be proceeded against as he had not realized any portion of the estate of his deceased father. It was ruled that the decree was capable of execution, but that Ibrahim was not liable in his own person or property for the amount due under the decree. Before any further steps were taken by the decree-holders Ibrahim died. It is admitted that previous to his death he had realized the Rs. 1,700 odd from the Jabalpur treasury. On the 26th February there was an application made for execution of the decree against Musammat Saira, widow of Ibrahim. She objected on certain grounds, amongst others, that she could not be proceeded against as she was not the legal representative of the judgment-debtor. The Court of first instance (Subordinate Judge of Jaunpur) allowed the application for execution against Musammat Saira. On appeal the District Judge of Jaunpur set aside the order of the Subordinate Judge and disallowed the application for execution on the ground that such an application was not within the purview of section 234 of the Code of Civil Procedure, under which section it purported to have been made. The decree-holder thereupon appealed to the High Court.

Maulvi *Karamat Husain*, for the appellant.

Mr. *B. E. O'Connor*, for the respondent.

BANERJI, J.—We are unable to agree with the learned Judge in holding that the decree-holder appellant was not entitled to take out execution of her decree against the respondent Saira Bibi. The appellant obtained a simple decree for money against one Ezid Bakhsh. Before the decree could be executed, Ezid Bakhsh died, and after his death execution was sought against Ibrahim, the son of Ezid Bakhsh, on the allegation that Ibrahim had appropriated and not duly disposed of assets left by Ezid Bakhsh to the extent of Rs. 1,716. If Ibrahim did in fact appropriate the amount of assets alleged to have been received and not duly disposed of by him, he became personally liable to the

decree-holder to the extent of those assets, under section 234 of the Code of Civil Procedure. Ibrahim, therefore, in substance, took the place of the original judgment-debtor to the extent of those assets, and to that extent became, to all intents and purposes, the judgment-debtor to the decree. On his death his legal representative became liable to the extent of the assets appropriated by her, and the decree-holder was entitled to apply for execution against her. In this case it has been found that Ibrahim received Rs. 1,716 payable to Ezid Bakhsh, the original judgment-debtor. To the extent of that amount he became personally liable, and the decree-holder is entitled to execute his decree against the respondent, the legal representative of Ibrahim, for the realization of that amount. In this view the lower appellate Court erred in dismissing the application for execution. I do not deem it necessary to decide in this case the general question whether, in every instance when the legal representative of a deceased judgment-debtor dies before execution of the decree has been completely obtained, an application for execution may be made against the legal representative of such representative. Having regard to the facts of this particular case, I am of opinion that the application of the decree-holder as against the respondent ought to have been entertained, and that the Court below erred in dismissing it. I would allow the appeal with costs, set aside the order of the lower appellate Court with costs, and restore that of the Court of first instance.

AIKMAN, J.—I agree. In my opinion the learned Subordinate Judge was right, and the learned District Judge took a wrong view of the provisions of section 234 of the Code of Civil Procedure. If the learned Judge's view were the sound one, much injustice might result. Supposing a judgment-debtor dies leaving property amply sufficient to pay his debts, and this property passes to an only son, who is brought on the record as the legal representative of the judgment-debtor. Then, according to the District Judge, if that son died before execution can be completed, his legal representative could not be proceeded against, although the original debtor's property might be in his hands. I do not think that could have been the intention of the law. We have been unable to find any case similar to the present one. It

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appears to me, however, that when the son of the original judgment-debtor was brought on the record as his legal representative, and when it was found that that son had in his hand money of the deceased which had not been duly disposed of, the son, to all intents and purposes, became the judgment-debtor. Therefore, in my opinion, the legal representative of the son can under section 234 be proceeded against subject to the limitations therein set forth. I concur in the order proposed.

BY THE COURT.—The order of the Court is that this appeal is allowed with costs, the order of the lower appellate Court set aside with costs, and that of the Court of first instance restored. —

Appeal decreed.

PRIVY COUNCIL.

P. C.
J. C.
1900
February 15.
March 24.

SAH LAL CHAND (DEFENDANT-APPELLANT) v. INDARJIT (PLAINTIFF-RESPONDENT).

On Appeal from the High Court for the North-Western Provinces at Allahabad.

Construction of the Indian Evidence Act, 1872, section 92—Evidence admitted to contradict a recital of receipt of consideration in a deed of sale—Oral agreement.

The Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money, and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid, notwithstanding anything in section 92 of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.

Where the consideration money had been acknowledged to have been paid by a recital in the sale deed to that effect, *Held* that it was no infringement of the above section for a Court to accept proof that, by a collateral arrangement between vendor and purchaser, the consideration money remained with purchaser, in his hands for the purposes and under the conditions agreed upon between them.

APPEAL from a decree (2nd June 1896) of the High Court (1) reversing a decree (13th June 1893) of the Subordinate Judge of Agra.

Present:—LORDS HOBHOUSE, DAVEY, and ROBERTSON, and SIR RICHARD COUCH.

(1) (1895) *Indarjit v. Lalchand*, I. L. R., 18 All., 168.

The respondent brought this suit on the 6th December 1892 against the appellant and a co-defendant, Musammat Kesar Kuar. The plaintiff obtained a decree in the High Court for Rs. 33,133, being the balance, with interest, of the consideration money for the sale of half of his estate in land, sold by the plaintiff to the defendants by sale-deed dated the 18th February 1888, in the proportion of six annas to the defendant Sah Lal Chand, and two annas to the other.

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Indarjit.

The main question now related to the effect on this case of section 92 of the Indian Evidence Act, I of 1872, and to whether or not the High Court had admitted oral evidence of facts which, if allowed, would have contradicted and varied, within the meaning of that section, the terms of a written instrument, the registered sale-deed. In that deed there was a recital that Indarjit had received the consideration Rs. 30,000. This payment was stated to have been made by his receiving Rs. 25,000, handed over to him in cash before the Sub-Registrar, Rs. 3,000 by a set-off against a previous debt due by Indarjit to Lalehand, and Rs. 2,000 by money paid to two vakils on his account.

Section 92 of the Evidence Act enacts that when the terms of a contract in writing have been proved no evidence of any oral agreement or statement shall be admitted, as between the parties thereto, for the purpose of contradicting, varying, adding to, or subtracting from, the written terms.

That the consideration agreed upon was Rs. 30,000 was common ground. The plaint alleged that to obtain an advance of money for the costs of a suit whereby Indarjit should obtain possession of his inheritance, then in the hands of strangers without title against him, he had executed the sale-deed of the 18th February 1888; that the present defendants were co-plaintiffs with him in his suit filed on the 21st February 1888; that a decree was made in their favour on the 10th December 1888, upheld on appeal on the 26th May 1891 and possession obtained; that during the suit all the expenses were defrayed by the Kothi of Sah Lal Chand, amounting to about Rs. 2,000. Beyond that the plaintiff had received no consideration money. The terms in which the sale-deed acknowledged receipt appear in their Lordships' judgment.

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The defendants filed separate answers, averring payment of the entire sum. One of the issues was whether the plaintiff was precluded from giving oral evidence in contradiction of the deed of the 18th February 1888. Another raised the questions of fact, whether there had been payment, or whether there had been a real arrangement whereby the consideration money was left with Sah Lal Chand on the understanding that the plaintiff, at the end of the litigation about his inheritance, should receive that money subject to a deduction of his share of the costs of the suit of 1888.

The Subordinate Judge found that no part of the consideration money had been paid in the manner alleged in the recital of the deed of the 18th February 1888. But he dismissed the suit on the ground that the plaintiff had not proved an agreement that payment of the purchase-money should be deferred, and should follow upon the termination of Indarjit's suit of 1888.

The High Court found that the case for the plaintiff was proved.

The judgment of the Division Bench (BANDERJI and AIKMAN, JJ.) is reported at length in I. L. R., 18 All., 168. They remanded the suit to the lower Court for the determination of the amount of the disbursements by the defendants on behalf of the plaintiff in the suit, which ended in the decree of the 26th May 1891. On return made, the High Court decreed in favour of the plaintiff Rs. 28,000, the balance of the consideration money, and Rs. 5,133-5-0 interest, the amount disbursed having been (as was not any longer disputed) the Rs. 2,000 alleged by the plaintiff to have been spent on the suit.

The defendant Sah Lal Chand alone appealed.

Mr. *G. E. A. Ross*, for the appellant, argued as to the question of the admission of evidence of an agreement, oral and contemporaneous, in variation of the written one evidenced by the sale-deed, that such evidence was disallowed by section 92. The principle there enacted would exclude the contradiction of the recital, and the addition of the collateral agreement asserted by the plaintiff. Besides this, the evidence, if admissible, was insufficient to outweigh that for the defence. On the facts the

suit had been rightly dismissed by the first Court, and that judgment should be restored.

Mr. *Herbert Cowell*, for the respondent, contended that the evidence admitted in this suit was not in variation, or contradiction, of the terms of an agreement in writing. The admission of evidence to contradict the misrecital of a fact, such as payment of the consideration for a sale in a sale-deed, was not within the rule enacted in section 92. On the contrary it had been clearly established as law that a recital of the payment of the consideration, contrary to fact, was not conclusively binding, but could be contradicted by proof of the actual transaction that had taken place. He referred to *Hukumchand v. Hiralal* (1); *Lala Himmat Sahai Singh v. Llewhellen* (2). As showing that the Evidence Act provided for the reception of such evidence, reference was made to explanation 3, under section 91, relating to the proof of facts; and to explanations 1 and 2 under section 92, the first expressly referring to want, or failure, of consideration, and the second permitting proof of the existence of any separate oral agreement not inconsistent with the terms of the one contained in the written instrument.

Mr. *G. E. A. Ross* replied.

Afterwards on the 24th March their Lordships' judgment was delivered by LORD DAVEY.

In this case the respondent sued the appellant and another person for a sum of Rs. 33,133-5-3 alleged to be due to the respondent as the balance of the consideration for a certain sale-deed dated 18th February 1888.

The first Court dismissed the suit, but on appeal the High Court of Allahabad, by its decree dated the 2nd of June 1896, reversed the decree of the Subordinate Judge and gave judgment for the respondent with costs.

By the sale-deed in question, after recitals that the respondent became entitled on the death of his maternal grandmother to the estate of his maternal grandfather, Jiwa Ram, but strangers had had got possession of the estate, and the respondent had not the necessary means of prosecuting a suit against them, and that he had therefore sold a moiety of the property for Rs. 30,000, as to

(1) (1876) I. L. R., 3 Bom., 159.

(2) (1885) I. L. R., 11 Cal., 486.

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 INDARJIT.

6 annas to Sah Lal Chand, and as to 2 annas to Musammat Kesar Kuar, and that he had received the entire consideration with reference to the share of each vendee in the manner detailed below, it was agreed that the vendees should institute a claim in the Court of the Subordinate Judge of Agra District jointly with the respondent to recover possession and enter into possession of the property decreed jointly with him, and take mesne profits of their share. And the respondent agreed that after the institution of the suit he would not make any settlement with respect to the subject-matter of the claim, or withdraw the claim, or get the case settled by arbitration without the consent of the vendees. If the decision of the Court should be unfavourable the Respondent was to bear the costs of the opposite party and repay the consideration and be responsible for the costs incurred.

The consideration money of Rs. 30,000 was stated to have been received from the vendees in the following manner:—

	Rs.
Received in cash at time of registration ...	25,000
By set-off against a previous debt due in respect of five rukkas ..	3,000
Caused to be paid Chandi Parshad and Jagan Parshad	2,000
Total ...	<u>30,000</u>

In May 1888 the respondent brought a suit for the recovery of Jiwa Ram's property jointly with the appellant and Kesar Kuar, and a decree was made in their favour by the Judge of first instance which was affirmed by the High Court on the 26th of May 1891. They subsequently executed the decree and obtained possession of the property.

By his plaint in the present suit which was filed on the 6th of December 1892 the respondent alleged that the three items in which the consideration of the sale-deed was said to have been paid were fictitious and that the money which was produced at the time of registration went back to Sah Lal Chand, and no item was due from the respondent under old accounts, nor was anything paid on respondent's behalf to Chandi Parshad and Jagan Parshad. And the respondent alleged that the sale

consideration was left with the vendees subject to the condition that the vendees should bear half the costs of the proposed suit and defray the other half (*i.e.* the respondent's share) out of the consideration money, and after obtaining a decree in the first or the appellate Court pay the respondent the balance (if any). The respondent named the expiry of the time allowed for an appeal to Her Majesty on the 15th January 1892 as the date of accrual of cause of action.

The appellant by his written statement denied the facts alleged by the respondent and pleaded that the claim was barred by time.

Both Courts have agreed that no part of the consideration money was paid to or on account of the respondent, and their Lordships need not say more on that subject than that they agree with the finding. The Subordinate Judge, however, held that the respondent had not made out by evidence the agreement alleged by him and his suit must therefore fail. The High Court on the other hand held that the respondent's story was in accordance with the probabilities of the case and was sufficiently proved by the evidence adduced by him. In this case no question of limitation arises.

The learned Judges have very fully and carefully stated and commented on the evidence of the respondent and his witnesses. Their Lordships agree with the conclusions of the learned Judges on the question of fact and with the reasons which they have given for accepting the respondent's story as true.

The point which was chiefly pressed on their Lordships by the learned Counsel for the appellant was also raised in the High Court and considered by the learned Judges, *viz.* that no evidence should have been received of the agreement alleged by the respondent because it varied or contradicted the written contract, and was therefore inadmissible under section 92 of the Evidence Act. Their Lordships, agreeing with the High Court, regard it as settled law that, notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written

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instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied, &c. The contract was to sell for Rs. 30,000 which was erroneously stated to have been paid, and it was competent for the respondent without infringing any provision of the Act to prove a collateral agreement that the purchase-money should remain in the appellant's hands for the purposes and subject to the conditions stated by the respondent. This objection therefore fails.

Their Lordships will humbly advise Her Majesty that this Appeal be dismissed. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Pyke and Parrott*.

Solicitors for the respondent:—Messrs. *Barrow and Rogers*.

1900
February 10.

APPELLATE CIVIL.

Before Mr. Justice Blair.

LALMAN DAS (DEFENDANT) v. JAGAN NATH SINGH AND OTHERS
(PLAINTIFFS).*

Civil Procedure Code, section 244—Plaint in a suit treated as an application under section 244—Limitation Act No. XV of 1877 (Indian Limitation Act) Sch. II, Art. 178.

Where a suit is filed under circumstances in which the proper remedy is an application under s. 244 of the Code of Civil Procedure, and the Court in the exercise of its discretion treats the plaint in the suit as an application under s. 244, the rule of limitation applicable will be that appropriate to applications under s. 244, namely, that prescribed by art. 178 of the second schedule to the Indian Limitation Act, 1877. *Jhamman Lal v. Kewal Ram* (1) and *Biru Mahata v. Shyama Churn Khawas* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad* for the appellant.

Maulvi *Ghulam Mujtaba* for the respondents.

BLAIR, J.—It seems to me that this appeal must succeed. At an auction sale held in execution of a mortgage decree a 16-biswansis share was sold instead of a 15-biswansis share, which was all that under the decree should have been brought to sale.

* Second Appeal No. 629 of 1899 from a decree of Babu Nihal Chunder, Subordinate Judge of Shahjahanpur, dated the 31st July 1899, confirming a decree of Babu Deoki Nandan Lal Sahai, Munsif of West Budaon, dated the 20th December 1898.

(1) Weekly Notes, 1899, p. 219.

(2) (1895) I. L. R., 22 Cal., 483.

The purchaser is a stranger, and for some 11 years has been in undisturbed possession of the share. The Court below in a somewhat vague manner has apparently treated this proceeding, not as a suit but as an application under section 244 of the Code of Civil Procedure, and following therein a decision of this Court in *Jhamman Lal v. Kewal Ram* (1), in which a Bench of this Court approved of the ruling in the case *Biru Mahata v. Shyama Churn Khawas* (2), decreed the claim of the plaintiffs. Mr. Gokul Prasad argues for the appellant that this proceeding having been treated by the Court below as a proceeding under section 244, the application of the plaintiff is barred by the operation of art. 178 of sch. ii of the Indian Limitation Act. If that article is applicable, it is clear that the three years' limitation has long expired. Mr. Muftaba for the respondents has suggested that no article of limitation is applicable to such an application as this. The case which he has cited to me is altogether of a different kind, and I see no reason to doubt the propriety of the application of art. 178. For this reason I allow the appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit with costs.

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JAGAN
NATH
SINGH.

Appeal decreed.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

KAUNSILLA (DEFENDANT) v. CHANDAR SEN (PLAINTIFF).*

Execution of decree—Sale in execution—Title of auction-purchaser—Purchaser not bound to inquire into the validity of the order under which the sale takes place.

Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan v. Kazim Husain* (3) distinguished. *Rewa Mahton v. Ram Kishen Singh* (4) and *Mukhoda Dassi v. Gopal Chunder Dutta* (5) referred to.

1900

June 7.

* Second Appeal No. 29 of 1898 from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 10th December 1897, reversing a decree of Pandit Bishambar Nath, Munsif of Aonla, Faridpur, dated the 19th April 1897.

(1) Weekly Notes, 1899, p. 219.

(3) (1891) I. L. R., 13 All., 432.

(2) (1895) I. L. R., 22 Calc., 483.

(4) (1886) I. L. R., 14 Calc., 18.

(5) (1899) I. L. R., 26 Calc., 734.

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THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal for the appellant.

Pandit Moti Lal (for whom *Maulvi Ghulam Mujtaba*) for the re-pondent.

BURKITT and HENDERSON, JJ.—On the 19th June 1872, one Jagannath mortgaged $11\frac{1}{4}$ biswas in a particular mahal to Tulshi Ram. This mortgage was a simple mortgage, but it appears that subsequently the mortgagee was let into possession (it is not shown how), and from that time the mortgage was treated as if it had been a usufructuary mortgage. Jagannath died leaving three sons, Raghunath Das, Narain Das and Mulchand, who may be described as Mulchand No. 1.

On the 29th October 1881, Raghunath and Narain Das sold their two-third shares in the $11\frac{1}{4}$ biswas (or $7\frac{1}{2}$ biswas) to Tulshi Ram, who thus became the owner of the $7\frac{1}{2}$ biswas, and continued to be the mortgagee of the $3\frac{3}{4}$ biswas of Mulchand No. 1. The share of Mulchand No. 1 remained unaffected. Tulshi Ram, who owned another 5 biswas in the same mahal, died, leaving a son Mulchand No. 2. Mulchand No. 2, who was in possession of the $11\frac{1}{4}$ biswas and his 5 biswas, on the 3rd January 1887, executed a mortgage purporting, as full owner, to mortgage the entire $16\frac{1}{4}$ biswas to Musammat Kaunsilla and Bishan Lal. The mortgagees, Musammat Kaunsilla and Bishan Lal, brought a suit upon their mortgage against Mulchand No. 2 only, and obtained a decree for sale, and under that decree the property was sold on 20th June 1895, and purchased by Musammat Kaunsilla for Rs. 7,000 odd. This sale was confirmed, and she obtained possession on the 24th September 1895.

On the 22nd February 1897, the plaintiff-repondent Chandar Sen, who had previously, on the 24th May 1897, purchased Mulchand No. 1's $3\frac{3}{4}$ biswas, sued to eject the defendant Musammat Kaunsilla. He was given an opportunity of redeeming, but he declined to accept it. The lower Appellate Court has given the plaintiff a decree for his claim as made.

It has been contended that, having regard to the Full Bench decision in the case of *Matadin Kasodhan v. Kazim Husain* (1),

(1) (1891) I. L. R., 13 All, 432.

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 SEN.

Kaunsilla took nothing under her purchase. That case has no reference to a sale which has actually taken place and been confirmed, as in the case before us. It merely deals with the right of the mortgagee who has not made prior or subsequent mortgagees parties to his suit to bring the property to sale. That case, in our opinion, therefore, has no application to the circumstances of the present case. It has been contended that Kaunsilla and Bishan Chand being subsequent mortgagees in respect to the one-third share of Mulchand No. 1 were not entitled to bring the mortgaged property to sale under the decree which they obtained in their suit. But, as a matter of fact, the property has been sold under that decree, and the sale has been confirmed and possession given. It is not necessary, as has been held by the Privy Council, for an intending purchaser at a sale under a decree to go behind the decree, to see whether the decree has been rightly made. In *Rewa Mahton v. Ram Kishen Singh* (1) their Lordships of the Privy Council say :—"To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." There seems to be no real distinction between a sale which takes place under a decree which directs a sale, as in the case of a mortgage, and a sale in execution held under an order made after a decree for money. See *Mukhoda Dasi v. Gopal Chander Dutta* (2). We have also been referred to two cases, one *Hargu Lal Singh v. Gobind Rai* (3) and the other an unreported case in Second Appeal No. 637 of 1897 recently decided by a Bench of this Court. Neither of these cases deals with the case of a sale which has actually taken place, and they are therefore not in point. The plaintiff in this case is the representative of the mortgagor, and we are unable to see how, under the circumstances of this case, he can be entitled to get possession without redeeming an admittedly existing lien on the property held by the defendants.

(1) (1886) L. R., 14 Cal., 18. (2) (1899) I. L. R., 20 Cal., 734.

(3) (1897) I. L. R., 19 All., 541.
 at p. 737.

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We therefore allow the appeal, set aside the judgment of the lower appellate Court and restore that of the Court of first instance, dismissing the claim with costs in all Courts.

Appeal decreed.

1900
June 7.

Before Mr. Justice Burdett and Mr. Justice Henderson.

MOTI RAM AND ANOTHER (DEFENDANTS) v. KUNDAN LAL AND OTHERS
(PLAINTIFFS).*

Civil Procedure Code, sections 372, 588—Assignment pending suit—Application by Assignees to be allowed to appeal against the decree—Order rejecting application—Appeal.

A defendant, pending the suit, made an assignment of his interest therein. No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* to the detriment of the assignees. The assignees filed a memorandum of appeal claiming that they were entitled to file an appeal under the circumstances set forth in their memorandum. The Court, apparently treating this memorandum as an application under section 372 of the Code of Civil Procedure, dismissed it. *Held* that an appeal would lie from this order of dismissal as from a decree. *Indo Mat v. Gaya Prasad* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal* and Babu *Durga Charan Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri* (for whom *Munshi Gulzari Lal*) for the respondent.

BURDETT and HENDERSON, JJ.—This is an appeal from a decree of the District Judge of Meerut, which in words directs the appeal before him to be dismissed. The case was one in which in a pending suit the present appellants purchased the interest of one Dalip; they made this purchase on the 5th July 1897. No application was made by the assignees or assignor to have the assignees brought on the record, and the suit was decided *ex parte* on the 13th July. The decree given in that suit was injurious to the present appellants, in that it debarred them from redeeming the mortgage. Thereupon the present appellants put in a memorandum of appeal before the Judge, and in that

* Second Appeal No. 966 of 1897 from a decree of H. G. Pearce, Esq., District Judge of Meerut, dated 13th September 1897, confirming a decree of Babu Jai Lal, Officiating Subordinate Judge of Meerut, dated the 13th July 1897.

(1) (1896) I. L. R., 19 All., 142.

memorandum claimed distinctly that they were entitled to file an appeal under the circumstances set forth in their memorandum. This application was supported by the assignor who disclaimed all interest in the subject of the suit. The District Judge treated the application for leave to appeal as if it were an application properly made under section 372 of the Code of Civil Procedure, and adopted the procedure prescribed by that section. Eventually the District Judge in his final order, after setting forth the facts, records that these appellants applied to be allowed to appeal under no section whatever. And because they had taken no steps to have their names entered (apparently before decree was passed) the learned Judge held "they have no *locus standi* now." Having come to this conclusion the District Judge dismissed the appeal. This order is evidently a clerical blunder, and what the learned Judge meant no doubt was that the application for leave to appeal was rejected.

In our opinion the District Judge was wrong in refusing the application. Section 372 clearly does apply to such a case. The assignment here was an assignment which took place pending the suit, in the sense in which the word suit has been interpreted in many cases in the Privy Council. There was a suit pending when the assignment took place, and that being so, we think section 372 is applicable, even though no application to have the assignees brought on the record was made till after the decree.

It is then contended that no appeal lies. Clearly section 588 does not give an appeal, as the appeal given by that section is an appeal against an order disallowing objections raised under section 372. Here objections were raised and they were allowed; consequently sub-section 21 does not apply. But it was held in the case of *Indo Mati v. Gaya Prasad* (1) in which an application to be brought on the record under section 372 had been refused, that the order rejecting the application was an adjudication on the representative right claimed by the applicant, and therefore amounted to a decree as that word is defined in section 2 of the Code. Applying that case, it appears to us that an appeal does lie to us, and we are of opinion that that appeal should be allowed. The facts are perfectly clear. There can be no doubt that the

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assignment did take place, and, as we held above, the application to have the assignees brought on the record was made, and properly made, under section 372 of the Code.

We therefore set aside that which we conceive to be the order of the Court below, i.e. the dismissal of the appellants' application to be brought on the record. We direct that the appellants be now brought on the record, and we remind the record to the Court of the District Judge with orders to decide whether the memorandum of appeal dated the 23rd August 1897, should or should not be admitted; and if admitted, to hear and decide the appeal according to law. Costs of this appeal will follow the event.

Appeal decreed.

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June 12.

Before Mr Justice Burkitt and Mr. Justice Henderson.
CHHIDDU SINGH AND OTHERS (PLAINTIFFS) v. DURGA DEI AND OTHERS
(DEFENDANTS).

Hindu law—Hindu widow—Reversioners entitled to succeed successively on death of Hindu widow—Suit by some of such reversioners to set aside alienations made by widow in possession—Res judicata.

Where there are several reversioners successively entitled to succeed to property for the time being in the possession of a Hindu female, a decree in a suit by some of such reversioners seeking to set aside alienations made by the female in possession will not necessarily constitute *res judicata* in respect of a similar suit brought by other reversioners *Bhagwanta v. Sukhi* (1) *Jumona Dassya Chowdhra v. Bamasoondarai Dassya Chowdhra* (2) and *Isri Dut Koer v. Mussamat Hansbutti Kocrain* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Satish Chandar Banerji) for the appellants.

Pandit Sundar Lal (for whom Pandit Baldeo Ram Dave) for the respondents.

HENDERSON, J. (BURKITT, J., concurring).—In this case the plaintiffs, who were the nephews of one Balu Singh, sued the defendants to recover possession of certain property which

* Second Appeal No 912 of 1897, from a decree of D. F. Addis, Esq., District Judge of Shahjahanpur, dated the 8th September 1897, reversing a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 27th August 1894.

(1) (1899) I. L. R., 22 All., 33. (2) (1876) L. R., 3 I. A., 72.
(3) (1883) L. R., 10 I. A., 150.

had been transferred to them or their predecessors in title by Rukmin Kunwar, the widow of Balu Singh. Balu Singh died in 1856, and Rukmin Kunwar died in 1890. It appears that in 1865 some of the brothers and nephews of Balu Singh brought a suit claiming as reversioners to set aside certain alienations, including the alienations now the subject of the present suit, on the ground that they were not made for legal necessity. This suit was heard by the Munsif of Gorakhpur. He decided as to a portion of the claim that the alienations were invalid. As to the alienations now the subject of this suit, he found that they were good, and this decision was upheld in appeal. In the present case the decision of the Munsif in the suit to which we have referred was relied on as being *res judicata* on the question whether the alienations were good or bad. It has been held by a Full Bench of this Court in *Bhagwanta v. Sukhi* (1) that where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one of such reversioners can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. Now in the present case the plaintiffs are the now reversioners of Balu Singh, being nephews of Balu Singh, other than the nephews who joined in the previous suit, and in our opinion they are not bound by the decision in the previous suit. In *Jumona Dassya Chowdhrani v. Bamasoonderei Dassya Chowdhrani* (2) their Lordships of the Privy Council doubted whether a decree in favour of an adoption passed in a suit by a reversioner to set aside the adoption is binding on any reversioner except the plaintiff, and whether a decision in such a suit adverse to the adoption would bind the adoptive son as between himself and any other than the plaintiff. In a later case, *Isri Dut Koer v. Musammat Hansbutti Koerain* (3), their Lordships expressed a strong opinion that such a decision would not be binding as *res judicata* in the case of a new reversioner. Having regard to these expressions of opinion by their Lordships of the Privy Council and to the decision of the Full Bench of this Court, we are of opinion that the Judge

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(1) (1899) I. L. R., 22 All., 33.

(2) (1876) L. R. 3 I. A., 72.

(3) (1883) L. R., 10 I. A., 150.

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was wrong in dismissing the suit on the plea of *res judicata*. We therefore reverse his finding on that point, and setting aside his decree, remand the case under section 562 of the Code of Civil Procedure to the lower appellate Court to be restored to the file of pending appeals and disposed of according to law. Costs of this appeal will follow the event.

Appeal decreed and cause remanded.

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June 12

Before Mr. Justice Banerji and Mr. Justice Aikman

PIRYA DAS (PLAINTIFF) v. VILAYAT KHAN AND OTHERS (DEFENDANTS) *

Execution of decree—Civil Procedure Code, section 335—Suit by unsuccessful auction-purchaser for a declaration of right and for possession—Court-fee—Act No. VII of 1871 (Court Fees Act), section 7.

A purchaser of property at a sale held in execution of a decree obtained formal possession, but was resisted in obtaining actual possession by a person, who claimed to be the owner in possession of the property. An application made by the auction-purchaser under section 335 of the Code of Civil Procedure was rejected, and the auction purchaser accordingly filed a suit against the person in possession claiming a declaration of his right to the property, and to be put in actual possession thereof. *Held*, that such a suit was one for a declaratory decree and consequential relief and Court-fee was payable under Clause IV (c) of section 7 of the Court Fees Act. *Dhondo Sakharam Kulkarni v. Govind Babaji Kulkarni* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gokul Prasad and Munshi Haribans Sahai for the appellants.

Maulvi Ghulam Mujtaba for the respondents.

BANERJI and AIKMAN, JJ.—We are of opinion that the lower appellate Court improperly dismissed the appeal before it. The plaintiff was the auction-purchaser of certain property, of which formal possession was delivered to him by the officer of the Court. The defendant No. 1 complained that the plaintiff was not entitled to possession, and that he, the defendant, had been improperly dispossessed. An inquiry was held, and an order was made by the Court under section 335 of the Code of Civil Procedure, declaring the defendant to be entitled to possession, and ordering

* Second Appeal No. 923 of 1897, from a decree of Maulvi Saiyid Akbar Husain, Judge of Small Causes exercising the powers of a Subordinate Judge of Agra, dated the 31st August 1897, confirming a decree of Pandit Bishun Lal Sarma, Munsif of Agra, dated the 4th June 1897.

(1) (1884) I. L. R., 9 Bom., 20.

him to be restored to possession. The plaintiff thereupon brought the present suit on the allegation that Miran Sakka, whose rights he had purchased at auction, was the owner of the property in question, and that he the plaintiff was consequently entitled to the possession of it. He prayed that his right to the property should be declared, and that possession should be restored to him. He also included in his prayer for relief a prayer to have the order under section 335 set aside. He valued the relief sought by him at Rs 62, but paid a Court-fee of Rs. 10 as in a suit for a declaratory decree only. The defendant objected to the amount of the Court-fee paid as insufficient. That objection was overruled by the Court of first instance which, however, dismissed the suit on the merits. The plaintiff appealed and paid on his memorandum of appeal a Court-fee of Rs. 10. The officer of the Court reported that the memorandum of appeal and the plaint were insufficiently stamped, and on that report the learned District Judge made the following order:—"Appellant to make good the deficiency in both Courts within four days or show cause." The learned Subordinate Judge, who decided the appeal in this case, says in his judgment that the appellant neither paid the required amount nor showed any cause. But this statement is clearly wrong. It appears that within the time allowed by the Court the appellant's pleader appeared to show cause, and did show cause apparently to the satisfaction of the District Judge, because we find that on the 16th July 1897, the District Judge ordered the appeal to be admitted subject to any objection as to Court-fees that might be raised at the hearing. At the hearing the objection was renewed on behalf of the respondents. The learned Judge of the Lower Appellate Court, without assigning any reasons for his opinion, held that the amount of Court-fees was insufficient, and thereupon dismissed the appeal. Even if it be assumed that the Court-fees paid on the plaint and the memorandum of appeal were insufficient, the Court was wrong in dismissing the appeal without giving the appellant an opportunity to make good the deficiency. Further, we are of opinion that there was no deficiency of Court-fee on the plaint in this case or on the memorandum of appeal. If the suit be treated as a suit for a declaration of the plaintiff's right to present possession of the property within

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the meaning of the last paragraph of section 335 of the Code of Civil Procedure, it was properly stamped with a Court-fee of Rs. 10, and this was the view taken by the Bombay High Court in *Dhondo Sahkaran Kulkarni v. Gobind Babaji Kulkarni* (1). In that case there was a distinct prayer for possession, and the Bombay Court held that, notwithstanding such prayer, the amount of Court-fee paid, i.e. Rs. 10, was sufficient. We are, however, not called upon to decide this point, because if the suit be treated as a suit for possession, the plaint was properly stamped under clause v, section 7 of the Court Fees Act. Further, as the claim sought not only a declaration of right but possession also, there was a prayer for a declaratory decree and consequential relief, and therefore the Court-fee was payable under clause IV (c) of section 7 of the Court Fees Act. In any aspect of the case the amount of Court-fee paid was sufficient or more than sufficient. The fact of the plaintiff asking for a declaration of his title and also to have the order passed under section 335 set aside was not asking for several declarations or relief, inasmuch as the order sought to be set aside negatived his right, and the effect of the declaration of his right would necessarily be the setting aside of that order. We think that the Subordinate Judge was wrong in dismissing the appeal. We set aside his decree and remand the case under section 562 of the Code of Civil Procedure to the lower appellate Court with directions to try the appeal before it on the merits. The appellant will have his costs of this appeal. Other costs will abide the event.

Appeal decreed and cause remanded.

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June 12.

Before Mr. Justice Burkitt and Mr. Justice Henderson

CHAJJU (DEFENDANT) v. UMRAO SINGH AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 13—Res judicata—Under what circumstances a decision may be res judicata as between defendants—Civil Procedure Code, section 514.

Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this

* Second Appeal No. 854 of 1897 from a decree of Babu Jai Lal, Additional Subordinate Judge of Meerut, dated 31st July 1897, confirming a decree of Babu Udit Narain Singh, Additional Munsif of Meerut, dated the 26th November 1895.

(1) (1884) I. L. R., 9 Bom., 20.

effect to arise there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim made against them as a group. *Ramchandra Narayan v. Narayan Mahadev* (1), *Ahmad Ali v. Najabat Khan* (2), and *Madhavi v. Kelu* (3), followed *Bishnath Singh v. Bisheshar Singh* (4) referred to

Section 544 of the Code of Civil Procedure does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants and to reverse the decree of the Court below in favour of all the defendants. *Puran Mal v. Krant Singh* (5) referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satish Chander Banerji*) for the respondents.

HENDERSON, J.—In 1870 one Sheo Singh died leaving a widow, Musammat Golab, and two grandsons, by a deceased daughter, named Gunga and Jamna. In 1875 his widow died. It was alleged that Sheo Singh at the time of his death was possessed of a portion of a house in which he, and after him his widow, resided.

In 1877 his nephews, the sons of a deceased brother, instituted a suit in which they alleged that they had been joint with Sheo Singh and claimed to eject Chajju, the appellant before us, from the portion of the house said to have been Sheo Singh's. Chajju was the brother of Musammat Golab, and the plaintiff in that suit, while admitting that he was in possession, averred that he had merely been allowed out of grace by Sheo Singh and Musammat Golab to live in the house.

Chajju, in his written statement, in the first place, pleaded that the plaintiffs had no right to sue, as the two grandsons, and not the plaintiffs, were the heirs of Sheo Singh. He further pleaded that the property in suit was his ancestral property, and that it had been in the possession of himself and his predecessors in title for upwards of a hundred years.

(1) (1886) 11 B. L. R., 11 Bom., 216.

(2) (1895) I. L. R., 18 All., 65.

(3) (1892) I. L. R., 15 Mad., 264.

(4) Weekly Notes, 1891, p. 34.

(5) (1897) I. L. R., 20 All., 8.

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Upon that written statement being filed Ganga and Jamna were added as defendants. They in their written statement alleged (1) that they, and not the plaintiffs, were entitled to the property in suit as the heirs of Sheo Singh, as Sheo Singh had never been joint with the plaintiffs; and (2) that the property in suit belonged to Sheo Singh. They also stated that when the suit was instituted they had themselves been about to take proceedings against their co-defendant to obtain possession of the property.

Having regard to the manner in which Chajju put forward his defence and to the fact that he was the brother of the grandmother of his co-defendants, it is difficult to avoid the suggestion that he was really colluding with them to defeat the plaintiffs' suit, and that his claim to the property in suit was put forward to meet the plaintiffs' case if the other ground should fail.

The defendant Chajju being in possession, the only real and substantial issues were whether the plaintiffs had a title better than that of the defendants, and if so, whether they had been in possession within 12 years from the institution of the suit.

The Munsif on the 24th November 1877, gave the plaintiffs a decree, having by his judgment found (1) that the plaintiffs had been joint with Sheo Singh and were therefore entitled to the property in suit in preference to his grandsons, (2) that the property in suit belonged to Sheo Singh, and (3) that Chajju's possession had been merely permissive. Against that decree Ganga and Jamna appealed, but, pending the hearing, Jamna withdrew from the appeal. Chajju did not appeal and was not made a party to the appeal preferred by his co-defendants.

The appeal was decided on the 20th May 1878, when the appellate Court, being of opinion that the plaintiff had never been joint with Sheo Singh and were therefore not entitled as against Ganga and Jamna to the property of Sheo Singh, set aside the decree of the Munsif and dismissed the suit.

On the 20th February 1895, Ganga and Jamna having in the meantime died without leaving issue, the present plaintiffs-respondents who are the representatives of a deceased brother of the father of Ganga and Jamna, instituted the present suit against Chajju to recover possession of the property which had been the subject-matter of the previous suit on the ground that it

belonged to Sheo Singh, whose heirs they claimed to be. A description of the portion of the house claimed is given in the prayer of their plaint. The plaint alleged that Chajju had continued to remain in permissive possession or occupation until a short time before the institution of the suit, when the plaintiffs called upon him to give up possession and he refused to do so.

Chajju set up the defence that the property was his ancestral property and had been in his possession for more than 12 years adversely to the plaintiffs.

In the lower Courts various issues were raised, but not determined, as both Courts were of opinion that Chajju not having appealed against the decree of the 24th November 1877, in the previous suit, was not bound by the decree of the 20th May 1878, which, setting aside that decree, dismissed the suit. They considered that Chajju was still bound by the decree of the 24th November 1877, against which he had not appealed, and that as between Chajju and his co-defendants Ganga and Jamna, and through them the plaintiffs-respondents, the findings (1) that the property in suit belonged to Sheo Singh and not to Chajju, and (2) that Chajju had merely been in permissive possession were *res adjudicata*. The first Court accordingly made a decree dismissing the suit and the lower appellate Court confirmed that decree.

In my opinion the lower Courts were wrong in treating these as *res adjudicata*.

We were referred to a Full Bench decision of this Court in S. A. 830 of 1886, in which it was broadly laid down by Edge, C.J., that there can be no *res adjudicata* as between co-defendants. For the purposes of that case it was unnecessary to lay down any principle in terms so very general. It was sufficient for the Court to have held that in the case before it the plea of *res adjudicata* was a bad plea, and I am not disposed to accept the broad proposition laid down by the Full Bench. Moreover, I find in a later case *Bishnath Singh v. Bisheshar Singh* (1) Edge, C.J., admitted that in exceptional cases there might be *res adjudicata* between co-defendants. We are therefore not precluded by the Full Bench decision from considering the only

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question raised before us, namely, whether the appellant Chajju was precluded from going into the defence raised by him by reason of section 13 of the Code of Civil Procedure.

In *Ramchandra Narayan v Narayan Mahadev* (1) the rule as to *res adjudicata* between co-defendants was thus stated:—
“Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*.”
“Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group” (p. 220). The rule so laid down was accepted by this Court in a recent case—*Ahmad Ali v. Najabat Khan* (2) and by the Madras Court in the case *Madhavi v. Kelu* (3).

It has been contended that that rule applies in the present case. It is said that in the former suit there was a conflict of interests between Chajju and his co-defendants, and that it was necessary for the adjudication of the plaintiffs' rights to adjudicate upon the rights and interests of the defendants *inter se*. Now it must be borne in mind that Ganga and Jamna were added as defendants in consequence of the first plea raised by Chajju himself to the effect that they were the real heirs of Sheo Singh, and not the plaintiffs. It was therefore common ground with all the defendants that if the property in suit belonged to Sheo Singh, Ganga and Jamna, and not the plaintiffs were entitled to it. The plaintiffs were admittedly out of possession, and the defendants who challenged their title were entitled to remain quiet and put them to proof of that title. It is true that the Munsif found, not only that the plaintiffs had proved their title to the property, but also that Chajju had merely been in permissive possession or occupation. The former finding was a complex finding amounting to a finding that the plaintiffs were heirs of Sheo Singh and

(1) (1886) I. L. R., 11 Bom., 216.

(2) (1895) I. L. R., 18 All., 65.

(3) (1892) I. L. R., 15 Mad., 264.

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that the property belonged to Sheo Singh, and no doubt it involved the further finding that the claim set up by Chajju that the property was his ancestral property failed, but the finding as to Chajju having been in permissive possession or occupation was only necessary when the further question, namely, whether Chajju, as alleged by him, had been in adverse possession for upwards of 12 years had to be considered. That question in a sense was only material when the plaintiffs' title to the property had been ascertained, inasmuch as an answer in the affirmative to the question would have afforded a complete defence to the plaintiff's suit. Now the moment it appeared that the plaintiffs, and not Ganga and Jamna, were the heirs of Sheo Singh, and it was necessary to go into Chajju's defence, Ganga and Jamna were no longer interested in the adjudication of the issue whether the property was Sheo Singh's or Chajju's, or whether the latter had or had not been in adverse possession for upwards of 12 years. The Munsif having come to the conclusion that Ganga and Jamna had no interest in the property in suit, I am unable to see how it was necessary to adjudicate upon the rights and interests of the defendants *inter se*. I would therefore hold that the decree of the Munsif is no bar to Chajju, the defendant in the present case, pleading and being allowed to prove, that the property in suit is his ancestral property, and has been in his possession for upwards of 12 years adversely to the plaintiffs-respondent.

Apart from these considerations, it has also been contended that the decree of the Munsif of the 24th November 1877, in the former suit no longer exists, and doubtless as between the plaintiffs in that suit and the plaintiffs in the present suit it certainly does not exist, as the former and the predecessor in title of the latter were all parties to the decree which set it aside.

Chajju did not appeal, but the appeal preferred by his co-defendants was based upon a ground common to all the defendants, namely, that assuming the property in suit to have been Sheo Singh's, the plaintiffs were not entitled to succeed. The appeal prevailed upon that ground, and had Chajju joined in, or been made a party to, the appeal, it is impossible to conceive that the finding of the appellate Court could have been otherwise than it was. The appellate Court finding that the plaintiffs had

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failed upon a ground common, not only to the defendants who appealed, but also to the other defendant who had not appealed, set aside the decree of the Munsif entirely and dismissed the suit. It has been urged that, having regard to the terms of section 544 of the Code of Civil Procedure, the Court ought not to have dismissed the suit. That section applies where the decree against several defendants proceeds on any ground common to all the defendants and only some of such defendants appeal. It does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants, and to reverse the decree of the Court below in favour of all the defendants—see *Puran Mal v. Krant Singh* (1). We must see, therefore, whether the decree of the Munsif proceeded upon a ground common to all the defendants. That decree in so far as it proceeded upon the ground that the plaintiffs in the former suit were entitled to the property of Sheo Singh, proceeded upon a ground common to all the defendants, because it was the case of all the defendants that if the property was Sheo Singh's the plaintiffs were not entitled to succeed. But it is said that the decree necessarily proceeded also upon the further ground, namely, that the property was Sheo Singh's, and not Chajju's as claimed by him. That seems to be so, and that ground is one which certainly was not common to both sets of defendants, and I am therefore inclined to think that section 544 of the Code of Civil Procedure was not applicable to the case, though, having regard to the first plea of Chajju in the lower Court, it is not easy to see how the appellate Court, when it found that the plaintiffs were not the heirs of Sheo Singh, could logically do otherwise than dismiss the suit. The point is not free from difficulty, but it is not necessary for the purposes of this judgment that I should decide the point, as I have already come to the conclusion that even if the decree of the 24th November 1877 be treated as subsisting *quoad* the defendant Chajju, it cannot be put forward as a bar to the defence pleaded by him.

(1) (1897) I. L. R., 20 All., 8.

In dealing with the question of *res adjudicata* the lower Courts, as I have already shown, have treated the decree of the 24th November, 1877, as *res adjudicata*, not only as to the property in suit being Sheo Singh's, but as to the possession of the defendant Chajju being permissive, and they have not allowed the question of adverse possession to be gone into. They have held that that decree shows that the possession of Chajju was permissive, and inasmuch as they considered nothing had been proved to show that that possession had since become adverse, they held that this suit was not barred by limitation.

Both Courts seem to have lost sight of the fact that in the former suit in 1877 Chajju in his written statement distinctly put forward an adverse claim to the property now in suit, claiming it as his ancestral property, and that Ganga and Jamna in their written statement stated that owing to an adverse claim made by Chajju they had been about to bring a suit against him for possession when the former suit was instituted. Both of these written statements have been put in evidence in the present case, and in the face of them it would be hard to say that Chajju's possession, if it has continued since 1877, was not adverse to Ganga and Jamna and to those who now claim through them.

Under these circumstances I would set aside the decree appealed against and remand the case to the first Court to try the case generally on its merits.

BURKIN, J.—I concur. The appeal is allowed and the record is remanded under section 562 of the Code of Civil Procedure through the lower appellate Court to the Court of first instance to be placed on the file of pending suits and decided according to law. The costs of the two lower Courts and of the appeal in this Court will abide the event.

Appeal decreed and cause remanded.

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Before Mr. Justice Burdett and Mr Justice Henderson

LACHHMAN DAS (PLAINTIFF) v. DALLU AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Joint family property sold in execution of a decree on a mortgage against the father alone Decree satisfied—Subsequent recovery by the sons of part of the mortgaged property—Remedy of mortgagee.

A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a further cash payment of Rs. 59, satisfied the mortgage debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree, and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage debt proportionate to the share in the joint family property owned by them. *Held*, that the original mortgage having become extinct the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhawani Prasad v. Kallu* (1) referred to *Dharam Singh v. Angan Lal* (2) followed.

THE facts of this case sufficiently appear from the judgment of Henderson, J.

Mr. *Sinha* and Munshi *Gobind Prasad* for the appellant.

Pandit *Baldeo Ram Dave* for the respondents.

BURDETT, J.—It is unnecessary for me to state the facts in the case. They have been fully dealt with in the judgment about to be pronounced by my brother Henderson, which I have had an opportunity of perusing. I concur in holding, as was done in the case of *Dharam Singh v. Angan Lal* (2), that the lien can be enforced by sale of the respondents' interest in the mortgaged property by reason of the pious duty incumbent on them of paying their father's lawful debts.

The amount for which they are liable is Rs. 275, with interest as set forth by my brother Henderson. I concur in the order proposed by him. A decree will be drawn up accordingly, giving the respondents six months from to-day, within which they can avoid sale by paying the sum now decreed against them. The appellant is entitled to proportionate costs in all Courts.

* Second Appeal No. 864 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 15th September 1897, reversing a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 31st March 1897.

(1) (1895) I. L. R., 17 All., 537.

(2) (1899) I. L. R., 21 All., 301.

HENDERSON, J.—On the 5th January 1877, one Data Ram, the father of a Mitakshara joint family, executed a mortgage in respect of 114 bighas in mauza Pular, in favour of the plaintiff-appellant to secure the sum of Rs 99-8 with interest. That sum, it was stated by the plaintiff in his plaint in the present suit, was required for the purpose of paying Government revenue, and this statement, though not admitted, was not denied in the written statements of the defendants.

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On the 16th August 1887, the plaintiff, in a suit brought by him on the mortgage against Data Ram alone, obtained a decree for sale of the mortgaged property, and on the 22nd November 1888, after the death of Data Ram, the property was sold under the decree and purchased by the plaintiff himself for Rs. 1,100, and the sale was confirmed on the 8th January, 1889.

It is important to note that the decree of the 16th August 1887 was for Rs. 1,129, including costs, to which was added interest at 6 per cent. per annum on Rs. 1,000 for six months, as ordered by the decree, making a total of Rs. 1,159. It has been found in the present suit, that after giving credit for the Rs. 1,100, the price fetched by the mortgaged property when sold, the balance of Rs. 59 was actually paid off. The decree of the 16th August 1887 was therefore satisfied, as has been found by the lower appellate Court.

On the 28th July 1896, however, the defendants-respondents, who are the sons of Data Ram, brought a suit against the plaintiff-appellant, alleging that as they were not parties to the decree of the 16th August 1887, they were not bound by that decree, nor was their one-fourth share in the mortgaged property affected by the sale under that decree, and on the 15th September 1896 they obtained a decree for possession of their one-fourth share on the sole ground that they were not parties to, and therefore not bound by, the decree of the 16th August 1887.

It appears that the sale of the mortgaged property on the 22nd November 1888 was made in proceedings in execution had against the respondents, Data Ram having died in the meantime, and that in such proceedings they did not object that the mortgage debt was one for which they were not liable, or that they were not bound by the decree, but, in my opinion, an objection

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of this nature could not have been entertained by the Court executing the decree, as the duty of that Court was confined to giving effect to the decree as it stood, and did not justify it in taking into consideration the question whether it was valid or binding upon the sons of the judgment-debtor or affected their interests in the property directed to be sold.

The decree of the 15th September 1896 was one of many decrees obtained under somewhat similar circumstances in this Province on the strength, it is said, of a decision of a Full Bench of this Court in the case of *Bhawani Prasad v. Kallu* (1) in which it was held that a mortgage decree in a suit upon a mortgage against a mortgagor who is the father of sons in an undivided family governed by the Mitakshara, is not binding upon the sons, of whose existence and interest the plaintiff mortgagee had notice, unless joined as parties to the suit, and that the sons if not made parties may sue for a declaration that the decree-holder is not entitled to sell, in execution of his decree for sale, the interest of the sons in the property comprised in the mortgage, although the sole ground of their suit is that they were not parties to the suit by the mortgagee. The decision in that case turned mainly, if not entirely, upon the interpretation which the Full Bench put upon section 85 of the Transfer of Property Act.

As in the case of *Bhawani Prasad v. Kallu* (1) it was not alleged in this suit or in the suit brought by the respondents against the appellant that the debt of the father was tainted with immorality or impiety. Before the passing of the Transfer of Property Act a decree upon a mortgage against a Hindu father passed in the absence of his sons was a good and valid decree, and it was always considered, and by some of the High Courts in India it is still considered, that a sale under such decree was so far good against the sons that it could only be impeached in a suit brought by them if it could be shown that the debt did not exist or had been incurred for immoral or impious purposes. According to the decision in the case of *Bhawani Prasad v. Kallu* (1) the sons may sue to have it declared that their interests were not affected by the decree, and in the present case, where the property was sold and purchased by

(1) (1895) I L R, 17 All., 537.

the decree-holder himself, the sons have obtained a decree for possession of their shares of the mortgaged property.

The decree of the 15th September 1896 has never been impeached, and apart altogether from the fact that this Court is bound by the decision of the Full Bench so far as it goes, it must be taken to have been rightly made.

The pre-ent suit, which is a suit by the mortgagee against the sons of Data Ram, was instituted on the 21st September 1896, and, except for the fact that the plaint recites the former suits and proceedings to which I have referred, the suit in form is an ordinary mortgage suit against the sons of Data Ram upon the original mortgage. Notwithstanding the decree obtained by him upon the mortgage and the proceeding and sales had thereon, the plaintiff treats the mortgage as still subsisting and claims that there is due upon an account being taken on the mortgage in the usual way the sum of Rs. 7,777. Against that sum he gives credit for the sum of Rs. 1,100 paid by him for the property when sold under his decree, and he claims to be entitled in consequence of his having been deprived of one-fourth of the property purchased by him to a one-fourth share of the balance, or Rs. 1,669 after giving credit for Rs. 150, the amount of profits which he admits having realized while the defendant's one-fourth share was in his possession. He, however, relinquishes a small sum, and the actual amount which he now claims is Rs. 1,500, and he seeks to enforce the payment of this sum by the sale of the one-fourth share of the defendants.

I have already drawn attention to the finding that previous to the suit by the respondents, the mortgage decree had been fully satisfied, and it is only because the plaintiff has since been deprived of a one-fourth share of the mortgaged property which he himself purchased for Rs. 1,100, that he is now able to say that any portion of the debt has not been discharged. In my opinion the original mortgage no longer exists, and if there is still outstanding a portion of the debt due upon the decree against Data Ram, then the respondents as sons of Data Ram are liable to that extent for the debt of their father, as they do not allege that the debt was one from which they could claim to be relieved. It is clear, I think, that but for the whole mortgaged property, including the

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interests of the respondents, having been sold, the mortgage decree could not be taken to have been satisfied. It would not be unfair to deduct one-fourth from the Rs. 1,100 which was paid for the whole property and take the balance Rs. 825 as the amount for which credit should have been given, leaving Rs. 275 still outstanding as a debt, for which the respondents are still liable. The plaintiff is not entitled, as he has sought to do, to treat the mortgage as if it were still subsisting, and to take the account upon it from the beginning and after giving credit for the Rs. 1,100 paid by him on the 22nd November 1888, and the sum of Rs. 150, the profits alleged to have been realized by him from the share of the defendants while it was in his possession, to say that the balance found upon the account on the footing of the mortgage as if subsisting is still due.

The sum of Rs. 275 became an outstanding debt as from the date of the respondent's decree declaring them entitled to possession of their one-fourth share, and it will carry such interest, if any, as was allowed on the principal amount of the mortgage decree. For this amount the respondents are undoubtedly liable to the plaintiff. Their father had full power to charge their interest in the mortgaged property for the debt, and nothing has taken place to discharge their interest from the mortgage lien.

The only point which remains to be determined is whether in this suit the lien can be enforced, and on this point we have been referred to the case of *Dharam Singh v. Angan Lal* (1), where such a lien was enforced. The facts of the case are not distinguishable from those of the present case, but the point now before us did not directly arise, as no objection was raised as to the form of the decree of the lower appellate Court which directed the property of the defendants to be sold to meet the claim. This appears from the following observations in the judgment of the Court:—"The plaintiffs are therefore entitled to claim the amount decreed to them. No objection was taken in argument to the form of the decree in the Court below." There is nothing in the decision of the Full Bench which prevents a mortgagee who has sued a Hindu father in the absence of his sons from subsequently bringing a suit to enforce his mortgage against the interests of the

sons in the ancestral property, and I am unable to see why the plaintiff here should not be entitled to enforce the lien against the respondents' interest in the mortgaged property on the ground of their pious obligation to pay their father's debts.

The decree of the lower appellate Court dismissing the plaintiff's claim ought, I think, to be set aside, and there ought to be a decree in favour of the plaintiff for Rs. 275, with such interest, if any, thereon, as may have been given by the decree of the 16th August 1887, from the 15th September 1896, and in default of the respondents paying the same by a day to be fixed, their one-fourth share in the mortgaged property should be sold in satisfaction of the claim.

Appeal decreed.

Before Mr. Justice Knox, Acting C J, and Mr. Justice Blair
DALEL SINGH AND OTHERS (JUDGMENT-DEBTORS) v. UMRAO SINGH AND
OTHERS (DECREE-HOLDERS).*

1900
June 15

Civil Procedure Code, section 294—Application by the decree-holder for leave to bid at a sale in execution of his decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. II, Art 179(1)—Execution of decree

Held, that an application for leave to bid at a sale in execution under section 294 of the Code of Civil Procedure is an application to take some step in aid of the execution of the decree within the meaning of art 179(1) of the second schedule of the Indian Limitation Act, 1877. *Bansi v. Suresh Mal* (1) followed. *Raghunundun Misser v. Kally Dut Misser* (2) dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Harendra Kr shna* for the appellant.

Mr. *W. M. Colvin* for the respondent.

KNOX, ACTING C J., and BLAIR, J.—The sole point with which we have to deal in this appeal is, whether the application for execution which was passed on the 19th November 1889, is or is not barred by limitation. The Court below taking in aid an application by the judgment-creditor, dated the 8th January 1896, has decided that it was not so barred. The contention

* First Appeal No 18 of 1900, from a decree of Mr. A. Rahman, Subordinate Judge of Meerut, dated the 6th January 1900

(1) (1890) I. L. R., 13 All., 211. (2) (1896) I. L. R., 23 Calc., 690.

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before us on behalf of the appellant is that the application just named is not an application which saves the running of time against the decree-holder. The application was one made by the decree-holder asking for permission under section 294 of the Code of Civil Procedure to bid for or purchase the property put up for sale. This Court has already held in the case of *Bansi v. Sikree Mal* (1) that the making of such an application is a step in aid of execution within the meaning of clause 4, No. 179, sch. ii of Limitation Act No. XV of 1877. The lower appellate Court acted therefore perfectly rightly, and was bound to follow that precedent. The learned vakil for the appellant asks us to lay down the opposite of this ruling on the ground, firstly, that this decision is the decision of a single Judge which he alleges has not been followed; secondly, on the ground that the Calcutta High Court in the case of *Raghunundun Misser v. Kally Dut Misser* (2) have ruled otherwise. There is no authority for the allegation that the ruling of this Court in I. L. R., 13 All., 211, has not been followed; the presumption is the other way. It is undoubtedly a matter to be regretted that different views should be taken on this point by different High Courts, but the question we have to decide is whether an application put in under section 294 of the Code of Civil Procedure is or is not an application in accordance with law to the proper Court to take some step in aid of execution of the decree. With the utmost respect for the learned Judges who have held otherwise, we fail to see how such an application can be held to lie outside the words we have just quoted. The fact that a decree-holder is prepared to bid for property and is anxious to purchase is, in the absence of a fraud which cannot be presumed, distinctly an act which modifies the conditions of the sale to the obvious benefit both of the decree-holder and the judgment-debtor, and brings the decree within nearer distance of complete execution and satisfaction. In many cases it does make the difference between complete satisfaction and partial satisfaction. There are indeed three steps. There is the step of the application which the decree-holder makes; there is the step taken by the Court of granting permission, and there is the

(1) (1890) I. L. R., 13 All., 211.

(2) (1896) I. L. R., 23 Cal., 690.

further step which the decree-holder again takes of availing himself of such permission by bidding at the sale.

The application before us was an application in accordance with law to the proper Court to take the step of granting permission, which step, in ordinary circumstances, would be a distinct step taken forward in aid of execution of the decree. For these reasons we give our approval, and adhere to the view which has hitherto been the view of this Court. We dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Know, Acting C. J., and Mr. Justice Blair.
PAHALWAN SINGH AND OTHERS (JUDGMENT-DEBTORS) v. NARAIN
DAS (DECREE-HOLDER).*

1900
June 28.

Execution of decree—Civil Procedure Code, section 230—Decree for payment of money—Hypothecation decree—Construction of document.

A decree was passed on the 5th March 1884, based on a compromise between the parties. The decree was for the payment of certain sums of money by instalments, and further went on to declare that "The property in the bond remains hypothecated as before. The defendants have no power to transfer it. If any other person brings to sale the hypothecated property in satisfaction of the debt due by the defendants, the plaintiff shall have power to take out execution of the decree without waiting for the instalments, and to cause the hypothecated property to be sold by auction." *Held*, that this was not a simple decree for the payment of money such as would come within the purview of section 230 of the Code of Civil Procedure. *Janki Prasad v. Baldeo Narain* (1) distinguished. *Chundra Nath Dey v. Burroda Shoodury Ghose* (2) and *Lal Behary Singh v. Halibur Rahman* (3) referred to.

THE respondents in this appeal held a decree against the appellants, dated the 5th March, 1884. The decree had been passed on a compromise, and was, in the first instance, a decree for the payment of certain sums of money by instalments; but it further contained a provision, quoted *verbatim* in the judgment of the Court, as to the maintenance of a lien on certain property and a power to the decree-holder to sell the hypothecated property by auction. On the 5th December 1896, an application for execution was made, which proved infructuous, and was struck off on

* First Appeal No. 82 of 1900, from a decree of Pandit Rai Inder Narain, Subordinate Judge of Farrukhabad, dated the 20th January 1900.

(1) (1876) I. L. R., 3 All., 216. (2) (1895) I. L. R., 22 Calc., 813.
(3) (1898) I. L. R., 26 Calc., 166.

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the 1st April 1897. The present application for execution was made on the 30th November 1899, and was resisted on the ground that execution of the decree was barred by limitation, regard being had to section 230 of the Code of Civil Procedure. The lower Court disallowed the objection and ordered execution to proceed. The judgment-debtors appealed to the High Court.

Munshi *Gobind Prasad* for the appellants.

Babu *Sital Prasad* for the respondent.

KNOX, ACTING C. J., and BLAIR, J.—The sole question which we have to consider is whether the decree, which was under execution in the Court below, is a simple money decree, or whether provision is made in it for something more. The appellant relies upon a Full Bench ruling of this Court, *Janki Prasad v. Baldeo Narain* (1), and contends that it is a simple money decree and no more. The circumstances under which the decree was obtained in *Janki Prasad v. Baldeo Narain* (1) and others and the case before us are very similar. In both cases the plaintiff had sued for a decree for sale. In both cases the dispute between them terminated in a compromise. In this case it was agreed that the plaintiff should realize his debt from his debtors by payment of a special sum within a special period and of the remainder by instalments. It further provided that if, after the payment of the first sum within the specified period, two successive instalments should remain in default, the plaintiff would be entitled to take out execution of the decree in a lump sum. After this follow the words which have given rise to this dispute and which we therefore quote here *verbatim* —
“The property hypothecated in the bond remains hypothecated as before. The defendants have no power to transfer it. If any other person brings to sale the hypothecated property in satisfaction of the debt due by the defendants the plaintiff shall have power to take out execution of the decree without waiting for the instalments, and to cause the hypothecated property to be sold by auction.” If this decree be compared with the decree which was before this Court in *Janki Prasad v. Baldeo Narain* (1), it will be found that the terms hardly differ, and do not differ in any material point, beyond this, perhaps, that the decree before us is

(1) (1876) I L. R., 3 All., 216.

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a little more positive in granting the right to enforce execution by sale. There is however, this very important difference between the present case and the case of *Janaki Prasad v. Baldeo Narain* (1), that while in the latter the terms of compromise were not embodied in the decree, and all that the decree did was to refer back to it and provide for payment by instalments only, in the present case the terms of compromise have been incorporated into the decree and made part and parcel of it. In *Janaki Prasad v. Baldeo Narain* (1) the learned Judges held themselves constrained by the terms of the decree and refused to look at what they considered might well have been the intention of the parties. In the present case we are under no such constraint. The terms of the decree before us undoubtedly go beyond the terms of an ordinary simple money decree and provide for sale under certain contingencies. It is true that the decree differs from a decree formally drawn up under section 88 of the Transfer of Property Act. But we are satisfied that it was the intention of the parties and of the Court that if default was made in payment of instalments, or if any other contingency mentioned in the decree arise, the decree-holder should be entitled to proceed to sell upon the decree as it stands. Reference was made to the case of *Chundra Nath Dey v. Burroda Shoondury Ghose* (2). That case has been distinguished in *Lal Behary Singh v. Habibur Rahman* (3). We do not agree with the Court below in the view it took of the Allahabad case cited before it. We are, however, of opinion that in spite of this the Court below came to a right conclusion.

We dismiss the appeal with costs.

Appeal dismissed.

- (1) (1876) I L R., 3 All., 216. (2) (1895) I L R., 22 Calc., 813.
 (3) (1898) I L R., 26 Calc., 166.

1899
June 29

Before Mr. Justice Banerji and Mr Justice Aikman.

BADRI DAS (DECREE-HOLDER) v. INAYAT KHAN AND ANOTHER
(OPPOSITE PARTIES) *

Act No. IV of 1882 (Transfer of Property Act), Section 90—Execution of decree—Decree for sale on a mortgage—Mortgaged property sold in execution of a decree held by a different mortgagee—Section 90 not applicable.

In order to make the remedy provided by section 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under section 90. Section 90 does not apply where the mortgaged property has been sold under a decree held by some other person. *Muhammad Akbar v. Munshi Ram* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) for the appellant.

Pandit *Sundar Lal* for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for a decree under section 90 of the Transfer of Property Act, which has been refused by the Court below. The appellant obtained a decree under section 88 of the Transfer of Property Act for the sale of certain houses and zamindari property. He has caused the houses to be sold by auction, but not the zamindari property. He alleges that the zamindari property has been sold in execution of a decree obtained by another mortgagee upon a prior mortgage, and on this ground he asks for a decree under section 90. This case, in our opinion, is fully governed by the ruling of this Court in *Muhammad Akbar v. Munshi Ram* (1). As was pointed out in that case, a condition precedent to an application under section 90 is that the mortgaged property has been sold, that the proceeds of the sale are insufficient to discharge the mortgage and that there is a balance due to the mortgagee. Here the mortgaged property, by which we must understand the whole of the mortgaged property, has not been sold at the instance of the decree-holder, and therefore he is not entitled to obtain a decree under section 90. It is not enough

* Second Appeal No 353 of 1898 from a decree of Kunwar Jwala Prasad, Additional Judge of Aligarh, dated the 4th February 1898, confirming a decree of Munshi Ganga Prasad, Munsif of Bulandshahr, dated the 26th June 1897.

(1) Weekly Notes, 1899, p. 208.

that a prior mortgagee has caused the zamindari property to be sold by auction. That such a sale has taken place is apparently due to the fault of the appellant himself. If he was a party to the suit in which the prior mortgagee obtained his decree, he ought to have redeemed the prior mortgage so as to make the mortgaged property available for the realization of the amount of his own mortgage. If, on the other hand, he was not made a party to the prior mortgagee's suit, it is still open to him to redeem that mortgage, and having done so, he would be entitled to bring the zamindari property to sale for the realization of his own money. In any case, as the appellant has not caused the whole of the property mortgaged to him to be sold, he cannot apply for a decree under section 90 of the Transfer of Property Act. This appeal must fail and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Kaur, Acting Chief Justice, and Mr. Justice Blair.

HAFIZ ABDUL RAHIM KHAN (APPLICANT) v. RAJA HARI RAJ SINGH
(OPPOSITE PARTY) *

Scheduled Districts Act (No XIV of 1874), section 3—Rule 17 of the Kumaon Rules, 1884—Code of Civil Procedure, sections 562, 564—Right of Appeal against order under section 562—Order of remand where decision of first Court was not confined to preliminary point.

Where the Deputy Commissioner of Nainital decided that a suit was barred by limitation, but at the same time also came to a definite decision on each of the other issues, and the Commissioner in appeal, setting aside the finding as to limitation, remanded the case under section 562 of the Code of Civil Procedure

Held that under Government Notification No. ⁶²⁸ 11-1891, dated 27th June, 1891, Rule 17, an appeal lies from such an order of remand. *Sayul Muzhar Hossain v. Mussamat Bodha Bibi* (1) referred to.

Held further that the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point, it was not, under sections 562, 564, of the Code of Civil Procedure, open to the Commissioner to make an order under section 562.

THE facts appear sufficiently from the judgment of the Court.

* Miscellaneous Reference No. 302 of 1890.

(1) (1894) 1. L. R., 17 All., 112.

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Pandit *Sundar Lal*, for the applicant.

The Government Advocate (Mr. *E. Chamber*) as *amicus curiæ*.

KNOX, ACTING C. J., and BLAIR, J.—The Government on the application of Hafiz Abdul Rahim Khan, a party to the suit—*Raja Hari Raj Singh v. Hafiz Abdul Rahim Khan*—has referred to this Court for report and opinion an order passed by the Commissioner of Kumaun on the 25th October, 1897, on the ground that it seems open to objection. The objection is thus stated:—"The judgment of the Commissioner, dated the 25th October, 1897, after deciding various points in the plaintiff's favour, remanded the case under section 562 of the Code of Civil Procedure." "The Government is advised that this is a most material irregularity." Upon the reference coming up for hearing it was brought to our notice that Raja Hari Raj Singh, the opposite party, had long been dead and that no one had been substituted on the record of the case. Under these circumstances we directed the Registrar to ascertain from the Government whether they still require any report and opinion. As the Government still requires a report and opinion, we have no alternative but to furnish it: no doubt the legal advisers of the Government will certify to the Government how far our opinion and report under these circumstances can form the basis of any effective order. With that we are not concerned and we express no opinion. We have heard the counsel for Hafiz Abdul Rahim Khan; we have heard the learned Government Advocate who has kindly appeared as *amicus curiæ* in the case. The suit between the parties is described in the Court of first instance as a suit for cancellation of so much of a sale-deed as injuriously affected the plaintiff and for possession over one acre of land. In the Deputy Commissioner's judgment the pleadings are set out, and five issues are framed. One of those issues, namely, the third, raises the issue of law as to whether the suit was or was not time-barred. The decision of the Deputy Commissioner was to the effect that the suit was time-barred. The remaining issues in this case were, however, considered, and a definite decision pronounced upon each one of them. In appeal the learned Commissioner dealt with the case in what was certainly a rather extraordinary way. He called for further information, and

himself inspected the area in dispute. After this he remanded the case under section 562 of the Code of Civil Procedure, evidently setting aside the judgment of the lower Court upon the preliminary point as to whether the suit was or was not time-barred. It is from this order under section 562 of the Code of Civil Procedure that the pre-ent reference is made. Two questions arise for decision. The first as to whether it was the intention of the Government in the rules made by them in exercise of the provisions of section 6, Scheduled Districts Act, that an appeal should lie from an order of this description. Government Notification No. ⁶²⁸~~VII-569B~~, dated 27th June, 1894, Rule 17, in its language is wide enough to include such an order as this. Any final decree which may seem open to objection may be referred, and we have the authority of the Privy Council in the case of *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi and another* (1) for holding that a remand order comprising the decision of a Court upon a cardinal issue of the suit, that issue being one which goes to the foundation of the case and which can never, while the decision stands, be disputed again, is a final decree. The next question is whether the decision of the Deputy Commissioner was one only upon a preliminary point, or whether it decided the other matters in issue. After reading the decision we have no doubt left. The suit between the parties was not confined by the Deputy Commissioner to the preliminary point of law, judgment was given on all the issues, and under these circumstances, looking to the language of section 562 and the imperative language of section 564, it was not open to the Commissioner to make the order he did under section 562 of the Code of Civil Procedure. Our opinion is that that order was a bad one, and under ordinary circumstances should have been set aside. If we had been dealing with the case as an appeal before us, it would have been so set aside, and the case would have been returned for disposal by the Court corresponding to that of the Commissioner for disposal according to law.

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Appeal decreed.

(1) (1894) I. L. R., 17 All., 112.

1900
June 27.

Before Mr. Justice Buxton and Mr. Justice Henderson.

HARI RAM (DEBTOR) v. BISHNATH SINGH (PLAINTIFF).*

Hindu law—Liability of member of joint family though not made a party to the suit—“Paisa ka” decree, meaning of

Where a decree provided for the sale of specified property of a joint family and, in the event of the amount of the decree not being thereby satisfied, for the realization of the balance from the defendants personally. Held that a junior member of the joint family, who was liable for his share of the debt sued on, but who was not made a party to the suit, could not successfully plead that the decree being a personal one in regard to the unsatisfied balance, he was not liable in regard to such unsatisfied balance. *See Mudho v. Basdeo Patak* (1) and *Bhawani Prasad v. Kally* (2) referred to.

THE facts appear sufficiently from the judgment of the Court.

Babu Jogindro Nath Chaudhry (for whom Babu Satya Chandra Mukerji) for the appellant.

Munshi Jwala Prasad (for whom Munshi Kulvinder Prasad) for the respondent.

BURKITT and HENDERSON, JJ.—In this case the plaintiff-respondent before us, sought to have it declared that he was entitled to a one-fourth share of the ancestral property of the family, and further to have it declared that his one-fourth share in certain property which had been attached and advertised for sale was not liable to be sold.

It appears that in 1885 a decree was obtained by the defendant-respondent upon a bond by which two houses of the joint family had been hypothecated. This bond was executed by the plaintiff's father and uncle and other younger members of the family, not including the plaintiff, who was very young at the time, to secure a debt which had been incurred many years before by the plaintiff's deceased grandfather, and a small sum advanced at the time of the execution of the bond. In a suit upon the bond to which the plaintiff was not made a party a decree was given for Rs. 1,363, for principal and interest and costs, and it directed that this amount should be realized in the first instance by the sale of the two houses hypothecated, and that, in the event of the proceeds of sale not being sufficient to satisfy the

* Second Appeal No. 230 of 1898 from a decree of R. Groeven, Esq., District Judge of Benares, dated the 17th December 1897, reversing a decree of Babu Nilmadhab Roy, Subordinate Judge of Benares, dated the 4th August 1897.

(1) (1890) I. L. R., 12 All., 99.

(2) (1895) I. L. R., 17 All., 537.

amount of the decree, the balance should be realized from the defendants personally.

The two houses were sold, and, after the application of the sale proceeds towards payment of the decree, there remained a considerable balance. To recover that balance certain property of the joint family has been attached. The plaintiff objected to the attachment, but his objection having been disallowed, he filed the present suit, claiming that his one-fourth share in the property attached was not liable to be sold. The lower appellate Court has found that the original debt was contracted for the benefit of the family, and not for immoral purposes, and that according to Hindu law the plaintiff was under a pious obligation to pay the same. Having so found, the learned District Judge, after referring to the case of *Bem Madho v. Basdeo Patah* (1) in his judgment, goes on to say :—" If, therefore, I had to decide this matter upon principles " of Hindu common law, I should dismiss this appeal without hesitation. In perusing the terms of the decree under section 90 (of " the Transfer of Property Act), however, I notice that the relief " granted in the event of non-realization by sale of the hypothecated property is specifically worded as *personal* against the then " existing defendants. It is perfectly true that by reference to the " plaint and the language of section 90 there does not appear to be " sufficient reason for the limitation of the decree to a purely personal relief against the defendants ; " and again he says :—" This " case is limited to the enforcement of a specific decree against the " defendants, and I am compelled to hold that under its explicit " wording it cannot be enforced against them " In our opinion the District Judge in his interpretation of the effect of a *personal* decree is wrong. The decree, so far as it provides for the recovery of the balance after the sale of the property hypothecated, is a personal decree as distinguished from a decree which directs that the amount decreed is to be realized by the sale of specific property. Under such a decree any property of the judgment-debtors may be attached and sold.

The lower appellate Court rightly held, as a matter of law, that to be liable for the original debt it was not necessary that the plaintiff should have been a party to the suit in which the

(1) (1890) I. L. R., 12 All., 99.

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decree was made; but taking an erroneous view of the effect of the personal decree, it held that the plaintiff's one-fourth share was not liable to be attached and sold. Having regard to the finding, however, that the original debt was not contracted for immoral purposes, and to the fact that the decree for the balance due after the sale of the hypothecated property, though a personal decree, might have been enforced against other property of the joint family belonging to the judgment-debtors, we think that the plaintiff's one-fourth share in the property attached is liable, with the shares of the other members of the joint family, to be sold in execution of the decree.

Another question was raised in the lower appellate Court based upon the decision in the case of *Bhawani Prasad v. Kallu* (1). That case has no application to the circumstances of the present case. It was not alleged that plaintiff in the original suit upon his bond had any notice of the existence or interest of the plaintiff who, at the time when the suit was instituted, could not have been more than one or two years old.

We set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant before us will have his costs in all Courts.

Appeal decreed.

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June 29.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

THE MUIR MILLS COMPANY, LIMITED, OF CAWNPORE (OPPOSITE PARTY) v. T. H. CONDON AND A. BUTTERWORTH (APPLICANTS).*

Act VI of 1882 (Indian Companies Act), sections 29, 58, 92—Application to compel registration of transfers of shares—Discretionary power of Directors to refuse registration—Articles of Association—Interference of the Courts.

Where the Directors of a Company (the Muir Mills) refused to register the transfer of shares and relied on Article 21 of the Articles of Association which empowered the Directors to "decline to register any transfer of shares "to any person of whom they may for any reason disapprove"—

(1). *Held*, that it is not necessary under section 58 for the applicants to join their vendors in their applications. *Ex parte Penney* (2) distinguished; *Skinner v. City of London Marine Insurance Company* (3); *London Founders'*

* First Appeal from Order No. 88 of 1899, from an order of J. Sanders, Esq., District Judge of Cawnpore, dated the 18th July 1899.

(1) (1895) I. L. R., 17 All., 537.

(2) (1872) L. R., 8 Ch., 446.

(3) (1885) 14 Q. B. D., 882.

Association v. Clarke (1); *Paine v. Hutchinson* (2); *Ex parte Gilbert* (3): referred to. *Ex parte Shaw* (4) followed.

(2). Where it was found that there was a defect in the constitution of the Board of Directors, which was not cured by the Articles of Association: *Held*, that the Court was not bound to dismiss the application under section 58 on the ground of its being premature, there having been no refusal to register by a properly constituted Board, but might treat the defence set up as a refusal, and deal with the application on the merits.

(3). Where it was found that the real objections entertained by the Directors to the various transferees were (1) their connection as employes of the Cawnpore Woollen Mills with McRobert (the Managing Director of the Cawnpore Woollen Mills) and the personal animosity existing between Johnson (the Managing Director of the Muir Mills) and McRobert, and (2) the desire of the Directors (of the Muir Mills) that McRobert should not add to his voting power at the meetings of the Company, and (3) that therefore the objections were not personal to the applicants themselves. *Held*, that where the Articles of Association give a discretionary power to the Directors to refuse to register a transfer, and it appears that the Directors have *bonâ fide* considered the matter, the Courts will not compel them to disclose their reasons, but if they do disclose their reasons, or evidence is produced as to their reasons, the Courts will consider whether those reasons proceeded on a right or wrong principle. *Held* further, applying the principles of English cases, that objections not personal to the transferees do not constitute legitimate reasons. *Poole v Middleton* (5); *In re Bell Bros.* (6); *Ex parte Penney* (7); *Moffat v. Farquhar* (8); *Kaikhosro v. Coorla Spinning and Weaving Co.* (9); *In re Coalport China Co.* (10), referred to.

THIS and five other similar appeals arose out of six applications under section 58 of the Indian Companies Act to compel the registration of the applicants as members of a Company.

The facts appear fully from the judgment of Henderson, J. Messrs. T. Conlan and Arindell, for the appellant.

Pandit Moti Lal Nehru and Babu Durga Charan Banerji, for the respondents.

BURKITT, J.—In this case I have had an opportunity of perusing the judgment which is about to be delivered by my brother Henderson. I fully concur in it, and have but little to add.

As to the preliminary points, in discussing which so much time was, I think unnecessarily, spent at the hearing of these

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(1) (1888) 20 Q. B. D., 573.

(2) (1898) L. R., 3 Ch., 388.

(3) (1892) I. L. R., 16 Bom., 398.

(4) (1877) 2 Q. B. D., 463.

(5) (1861) 29 Beav. 616, p. 650.

(6) 7 Law Times Reports, 689.

(7) (1872) L. R., 8 Ch., 446.

(8) (1877) L. R., 7 Ch. D., 591.

(9) (1891) I. L. R., 16 Bom., 80.

(10) (1895) L. R., 2 Ch., 404.

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appeals, I fail to see why they should have been raised at all by the applicants in the Court below (respondents here), where most of them were incidentally raised during the hearing of the applications. Though the proceedings before the lower Court were in form applications under section 53 of the Indian Companies Act, they were tried most elaborately as regular suits. Regular pleadings were filed on both sides and issues joined on them. By their pleadings the Muir Mills Company admitted that the respondents had formally applied to have the shares registered in their names, and that the Company had refused to allow registration. The applicants in fact said that the Company had improperly refused to register the transfers. The Company, in reply, admitted the refusals, and justified their action by relying on Article 21 of their Articles of Association. It is difficult to understand why on such pleadings the applicants should during the hearing below have endeavoured to prove that in some of the cases there had not been any refusal to register owing to a legal defect in the constitution of the Board by which the refusals in those cases purported to have been made. In those cases if the contention of the applicants had been sustained they would have succeeded in showing that they had come into Court without any substantial cause of action. But anyhow as to all these preliminary matters I think my learned brother has come to a right conclusion.

On the merits it is abundantly clear that, though the appellant Company was not by law bound to disclose the reasons which actuated the Directors in declining to register the transfers which form the subject of these appeals, those reasons have been very fully disclosed. The question we have to consider is, whether those reasons are legitimate or are arbitrary and unjustifiable. Those reasons succinctly put are that the Directors of the Muir Mills Company knew the transferees, the applicants, to be employes of Mr. McRobert of the Woollen Mills; that Mr. McRobert had not long previously been a Director of the Muir Mills; that he quarrelled with Mr. Johnson, the Managing Director of the Muir Mills, saying he "dis-trusted the management"; that he had prosecuted one of the other Directors for a technical offence under the Companies Act, and refused to seek

re-election as a Director; and that the Directors of the Muir Mills Company therefore feared that these transferees being his employes would support him by their votes as shareholders at shareholders' meetings of the Muir Mills Company, that they would be "litigious and cantankerous," and would "harass the management", the meaning of which phrase no doubt is that they would support Mr. McRobert's views as to the advisability of making a change in the management. There was evidence given to show that the Managing Director, Johnson, threatened to resign if McRobert had anything to do with the management, and that the Directors believed that the loss of Johnson's services would be injurious to the interests of the Company. Shortly put, the Directors were apprehensive that any increase in McRobert's voting power would assist him in enforcing his views as to the management, and as the transferees were McRobert's subordinates in another Mill the Muir Mill Directors refused to register the transfers to them. It should be mentioned here (1) that McRobert was, at the time when these transfers were made, the largest shareholder in the Muir Mills Company; (2) that he did not, for the purpose of increasing his own voting power, transfer any of his own shares to his subordinates as his nominees, but on the contrary assisted them in purchasing the shares in open market; (3) that the Cawnpore Woollen Mills Company is in no way a rival in business to the Muir Mills Company which is a Cotton Mill; and (4) that admittedly there is no personal objection to any of the transferees; they are acknowledged to be perfectly proper persons to become members of the appellant Company, and to be unobjectionable in all respects except in that they are subordinates of McRobert at the Woollen Mills.

The principles of law applicable to a case of this kind will be found most exhaustively laid down by Mr. Justice Chitty in the case of *In re Bell Brothers, Ltd., ex parte Hodgson* (1), where that learned Judge cites as his authority a large number of reported cases, most of which were referred to in the argument before us. In that case Arts. 18 and 34 of the Articles of Association of Bell Brothers, Ltd., somewhat resembled Art. 21 of the Articles of Association in the present case, but conferred on the Directors the

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(1) 7 Times Law Reports, 689.

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power of disapproving and rejecting intending shareholders in stronger language than that used in Art. 21 of the appellant company here.

The learned Judge held that the right of transfer conferred on every shareholder was subject to the discretionary power conferred on the Directors by Arts. 18 and 34. So in the present case a right to transfer is assumed by Art. 19 to belong to every holder of shares in the Company, subject to the discretionary power given to the Directors by Art. 21 of declining to register any transfer of shares to any person of whom they may for any reason disapprove.

As to the manner in which that discretionary power is to be exercised, the learned Judge says that it is of "a fiduciary nature" and must be exercised in good faith, *i. e.*, legitimately, for the "purpose for which it is conferred. It must not be exercised corruptly or fraudulently or arbitrarily or capriciously or wantonly. It may not be exercised for a collateral purpose. In exercising it the Directors must act in good faith in the interests of the Company, and they must fairly consider the question of the transferee's fitness at a Board Meeting." Then as to the power of the Court to interfere with the Directors' decision, the judgment lays down that the Court will not review the Directors' decision when they have in good faith "rejected a transfer on the ground that the transferee is not a fit person to become a member of the Company"; that the Court will not draw unfavourable inferences against the Directors merely because the latter have declined to assign their reason for disallowing the transfers, but that if the Directors do disclose their reasons, "the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not, or in other words, to ascertain whether the Directors have proceeded on a right or a wrong principle." The judgment then states that the Court will not overrule the Directors' decision merely because the Court itself would not have come to the same conclusion, and then follows this most important passage:—"But if they" (*i. e.*, the reasons assigned by the Directors) "are not legitimate, as for instance, if the Directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them up among

"his nominees, the Court would hold that the power had not been "duly exercised. So also if the reason assigned is that the transferee's name is Smith and is not Bell."

Now in applying the above principles to these appeals, I find in the voluminous evidence adduced on both sides that the reason, and the only reason, which actuated the Directors in disallowing the respondents' transfers is because the latter were subordinates of McRobert, and the Directors believed that these transferees would at shareholders' meetings vote with McRobert in opposing the directorate, and especially the Managing Director Johnson; that they would "harass the management". Can such a reason be considered to be a legitimate reason for refusing to allow the respondents to become members of the Muir Mills Company. The Directors say their action was taken in good faith in the interests of the Company. They say that if McRobert was able to interfere in the management of the Mills the Managing Director Johnson would resign, and that, they say, would injure the Company. The Directors consider Johnson to be a good man of business, an opinion which Johnson also shares, but it is quite open to McRobert honestly to hold a different opinion, and from his saying that he "distrusted the management," he apparently does not concur with the Directors. Even if McRobert's object in procuring shares for his subordinates was with their assistance to enforce his views on and so interfere with the management, and even if he transferred some of his own shares to his nominees for that purpose, it is not intelligible how such action on his part should be considered to be injurious to the interests of the Muir Mills Company, though no doubt it would be unpleasant to the existing Board of Directors. I can see no pretence for supposing that the acquisition by McRobert of an increased voting power could be injurious to the Company, in which he is the largest shareholder, but in which under Art. 55 of the Articles of Association his voting power is not commensurate with his holding.

It seems to me that all through these cases the interests of the Muir Mills Company have been too much mixed up with the personal interests of the Directors. The Directors may well think that unless they continue on the Board the Company will

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suffer. Other shareholders may legitimately entertain a different opinion, and may, like McRobert, "distrust the management", and desire to make a change in the Board of Directors. Can then that Board legitimately refuse to pass transfers made to persons who, the Board believe, will act in conjunction with a prominent shareholder who "distrusts the management". On the authority of the passages from the judgment cited above, I am of opinion that such a reason is not legitimate. It practically amounts to this, that the Board will not admit any new shareholder who, they believe, will not support or will oppose their management. It is impossible, in my opinion, to regard such an exercise of the Directors' fiduciary discretionary power as being other than one of the most arbitrary and unjustifiable nature, exercised for a collateral purpose, namely, to safeguard the Directors' personal interests against McRobert, and not in the interest of the Company as such. The transfers were refused, not in good faith in the interests of the Company, but to prevent McRobert having at his disposal an increased voting power which the Directors apprehended he might use to "harass" their management. For that reason the Directors' objections, though to that extent personal to the transferees, are not legitimate objections. The constitution of the Company is not such as would justify the Directors in excluding from membership all persons who, they feared, would oppose their management.

For the above reasons I am of opinion that the District Judge was right in allowing the applications and in directing the registration of the shares purchased by the applicants respondents.

Therefore, in concurrence with my learned brother, I direct that these appeals be dismissed.

HENDERSON, J.—These appeals have arisen out of six applications which were made under section 53 of the Indian Companies Act, to compel the registration of the applicants as members of the Muir Mills Company, Ltd. There were five applicants claiming to be registered, but one of these, Butterworth, sought to have his name registered in respect of two sets of shares purchased by him at different times, and he made a separate application in respect of each set. In his first application his

vendor, Dr. Condon, joined. The other applicants were James Scott, the dyeing master; W. Vickers, the accountant; P. Scott, the weaving master; and H. Thomson, the engineer of the Cawnpore Woollen Mills, and none of them joined in their applications the persons from whom they had purchased the shares in respect of which they sought to be registered. Butterworth was the Mill Manager of the Cawnpore Woollen Mill. One Mr. McRobert was then, and now is, the Managing Director of those Mills.

The following particulars with regard to the purchases of the various shares and the refusal to register may here be conveniently noted:—

(1). Butterworth purchased three shares from Dr. Condon, the transfer deed was dated the 3rd April 1897, and application for registration was made on the 20th April 1897. On the 23rd April 1897, the application was refused by the Directors, the Directors being Newcomen, Smith, and Arindell.

(2). James Scott purchased three shares from Mrs. Wilson; payment being made on the 17th June and the deed of transfer, dated 23rd June, 1897. Application was made for registration of the transfer on the 16th July, 1897, and refused by the same Directors on the 11th August, 1897.

(3). W. Vickers purchased five shares from one Gillespie, payment being made on the 31st August, 1897, and the transfer deed dated 14th September, 1897. Application was made for registration on the 14th September, 1897, and refused by the same Directors, on the 15th September, 1897.

(4). P. Scott purchased three shares from Gillespie, payment being made on the 31st August, 1897, and the transfer deed dated the 1st November, 1897. Application was made for registration on the 2nd November, 1897, and refused by the Directors, Beer and Newcomen, on the 5th November, 1897.

(5). H. Thompson purchased five shares from Gillespie, payment being made on the 31st August, 1897, and the deed of transfer dated 1st November, 1897. Application for registration was made on the 15th November, 1897, and refused by the Directors, Beer, Newcomen, and Johnson, on the 18th November, 1897.

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(6). Butterworth purchased five shares from Gillespie, payment being made on the 31st August, 1897, and the transfer deed dated 1st November, 1897. Application for registration was made on the 15th November, 1897, and refused on the 18th November, 1897, by Beer, Newcomen, and Johnson.

It should be mentioned that on the 5th January, 1898, Butterworth made a second application for registration of the two sets of shares purchased by him, and this application was refused by the Directors Beer, Newcomen, and Johnson on the 28th January, 1898.

In refusing to register the various transfers the Directors acted under Art. 21 of the Articles of Association of the Company. That article is as follows :—"The Directors may decline to register any transfer of shares to any person of whom they may for any reason disapprove, or of any share upon which the Company has a lien"; and in refusing to register the transfers, except in the case of Butterworth, they gave no reasons for their refusal except that they did so under Art. 21 of the Articles of Association. In Butterworth's case certain correspondence took place on the subject. In that correspondence the reason first given was that the Directors acted under Art. 21 of the Articles of Association. In a letter of the 27th May, 1897, to Butterworth, it was alleged that the reason for the Directors' refusal to register was that they did not consider it would be in the interests of the Company to register Butterworth as a member; and in a letter of the 28th May, 1897, to Dr. Condon, in reply to a letter from him, they stated that they were "taking every precaution to avoid having any shareholders who are, in their opinion, likely to prove ill-disposed towards the management of the Company, or of a litigious or cantankerous disposition."

In the applications under section 58 of the Indian Companies Act, it was alleged, as the ground upon which such applications were based, that the Directors had acted arbitrarily and without sufficient cause, and in a wrongful exercise of their powers in refusing to register the different applications for registration. The Company in answer to the several applications filed written statements, in which it contended that it was not necessary for the Directors in refusing under Art. 21 of the Articles of Association

to register transfers of shares, to give any reasons, and alleged that the refusals to register had been made *bond fide* in the interest of the Company, after due consideration and for reasons which were legitimate and sufficient. Upon this the following issue was framed, *viz.*—Whether the Company had arbitrarily and without sufficient cause refused to register the transfers.

By consent all the applications were heard together.

Before proceeding to deal with the main contentions raised in these appeals it will be well to dispose of certain questions which were raised during the argument. The first question was as to the competency of the applicants who had not joined their vendors in their applications to apply under section 53 of the Indian Companies Act. It was contended that they had no *locus standi* as they were not, and could not be, members of the Company until the transfers to them had been registered. *Ex parte Penny* (1) was relied upon as showing that the transferor, should make the application, or at all events join in it. In that case the application was made by both transferor and intended transferee, but a reference to the Articles of Association of the Company concerned makes it clear that there could be no *transfer* without the approval of the Directors. The articles provided that “no person “not already a shareholder shall be entitled to become the transferee of any share unless approved of by the Board.” In the cases before us Art. 21 deals merely with the right of the Directors to decline to register any transfer of shares already made, if they disapprove for any reason of the transferee. The transfers were otherwise complete as between the transferors and the transferees, the purchase money had been paid, and the transfer deeds, in each case executed by both transferor and transferee. On a sale of shares the seller contracts to execute a valid transfer and to hand the same to the transferee. *Skinner v. City of London Marine Insurance Co.* (2). He does not contract that the Company will register the transfer. *London Founders Association v. Clarke* (3). It is the duty of the transferee to get himself registered. *Paine v. Hutchinson* (4). Section 29 of the Indian Companies Act, which corresponds *verbatim* with section

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(1) (1872) L. R., 8 Ch., 446.

(2) (1885) 14 Q. B. D., 882.

(3) (1888) 20 Q. B. D., 576.

(4) (1868) L. R., 3 Ch., 333.

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26 of the English Companies Act, 1867, assumes the right of the transferee to apply for registration and enables the transferor, where the transferee fails to do so, to apply to get the transfer registered. In *ex parte Shaw* (1) an application by the transferee alone under section 35 of the English Companies Act, 1862, was allowed on the ground that the transfer was complete. The reasoning in that case was accepted by Farran, J., in *ex parte Gilbert* (2). In my opinion *ex parte Shaw* is an authority for our holding that it is not necessary in the present cases for the transferors to join in the applications.

No question was raised as to whether the summary procedure apparently intended by section 58 of the Indian Companies Act was the proper procedure here. It is sufficient to say that these applications have not been tried summarily. They have practically in all respects been treated as if the parties had proceeded by suit.

The second question, which it will be convenient to deal with before discussing the main grounds of appeal, turns upon the constitution of the Board of Directors which refused the applications for registration made by James Scott, Vickers and P. Scott.

[His Lordship having pointed out in regard to the applications of James Scott and Vickers that the proper forms had not been complied with in the appointment of Arindell and Smith to act for Cooper and Beer, and that, if the appointments of the two former were to be held valid, there would have been six Directors instead of a maximum of four allowed by the Articles of Association, held that the defect was cured by Article 86 of the Articles of Association which ran as follows:—

“All acts done by any meeting of Directors * * * or by
“any person acting as a Director, shall be valid and effectual
“notwithstanding that it be afterwards discovered that there was
“some defect in their appointment or qualifications respectively.”

His Lordship then continued:—]

In the case of P. Scott the position is somewhat different. There the Board which rejected the application for registration consisted of Beer and Newcomen; who were both qualified

(1) (1877) 2 Q. B. D., 468.

(2) (1892) 1 L. R., 16 Bom., 398.

Directors, but they formed less than a quorum as required by Art. 67 of the Articles of Association. Under that article "the number of Directors to form a quorum for the transaction of business shall be three, including the Managing Director, or such substitute as may be acting for him." It seems to me that the action of a Board so constituted is not validated by Art. 86, and that P. Scott is entitled now to say that their action was not binding upon him. What then is the result? His application is in all respects the same as the other applications under section 58 of the Indian Companies Act. He has treated their refusal as an improper refusal, and has alleged that it was made arbitrarily and without sufficient cause, and the answer to the application by the Company, as in the other cases, was that the Directors had *bona fide* after due consideration and for sufficient reason refused to register, and the matter has been tried out on that basis. Either there has been no refusal in law and his application, which is based solely and entirely on the allegation that there has been an improper refusal, is premature, or it may be taken that the defence set up on the application under section 58 of the Indian Companies Act is a refusal, and the matter dealt with on its merits. I think it is open to us to adopt the latter course rather than dismiss the application as premature. This disposes of the questions which have been raised, other than the questions which go to the merits of the application.

I have already referred to the issue raised by the lower Court. Evidence was adduced by both sides upon that issue. Of the applicants, Butterworth was the only one who was examined on their behalf in support of the applications under section 58 of the Companies Act. They, however, called one Cave who had been in the service of the Muir Mills Company when the registrations had been refused, but who had since left, Beer, one of the Directors already mentioned of the Company, and Dr. Condon. Butterworth admitted that the first 3 shares purchased by him were offered to him by McRobert, the Manager of the Cawnpore Woollen Mills, that he did not inquire if he had money to pay for shares; that his account with the mills was at debit; that he asked McRobert for permission to further overdraw, and that permission was given; that McRobert directed

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the accountant to make out a cheque for the shares on the Mussoorie Bank in favour of Dr. Condon to pay for the share; that he (Butterworth) eventually paid back the purchase money by instalments, and that his debit was still from Rs. 2,000 to Rs. 3,000; that most probably McRobert wrote for the shares and sent them to him; that when the transfer deed came McRobert sent it back for alterations to Dr. Condon; that on receipt of the letter intimating that the Directors declined to register he consulted McRobert, who advised him in his correspondence with regard to the refusal. As to the second lot of 5 shares he admitted that they had been paid for on the 31st August, 1897; that McRobert had caused his account to be debited with Rs. 1,300, the price; that he could not say why two months had elapsed between the date of his being so debited and the date of the transfer deed: that he had nothing to do with the seller; that he was not sure whether McRobert or he himself had applied for registration; that it was possible that the scrip remained with McRobert up to the time of the application to the Court. He then went on to say that he could not swear that the Directors had not *bona fide* considered his application for registration. He also said that he knew that McRobert's relations with the Company (The Muir Mills Co.) were not amicable.

Cave who had left the Company's service because he had been superseded by another employé, stated that the refusal to register the transfer to Butterworth was because he was employed in the Woollen Mills. The reasons he said were contained in the letter of the 28th May, 1897, to Dr. Condon, to which reference has been made. It was thought that a gentleman in the Cawnpore Woollen Mills might be influenced by McRobert to the detriment of the Company. Cave had been present at the meetings at which the different applications had been considered, and he referred to the minutes of such meetings which showed that all the applications had been considered, and in some instances remitted to subsequent meetings for further consideration. "I certainly swear," he said, "that the Directors gave *bona fide* consideration to the question of registration," and again "whether they acted in an arbitrary manner is a matter of opinion. I think they had some grounds for what they did. In my opinion they did not act in an

arbitrary manner." Cave was apparently called with a view to proving that the refusal to register the transfers was solely on account of Johnson, the Managing Director, and at his instance. This I think he failed to do. Examined on this point by the counsel for the applicants, he said: "I am not aware that Johnson had any voice in the refusal to register Butterworth's and the other shares."

Beer who was present at the meetings of Directors which refused to register the transfers to P. Scott, Thompson, and Butterworth, was examined as to the reasons which guided the Directors in their refusals. From his evidence it is clear that the reason was the fear that the transferees being employes of the Mills of which McRobert was Manager, would be under his influence, and would vote just as he wished them to. He stated that while McRobert had been a Director of the Muir Mills, there had been various stormy meetings, and he had evinced hostility on more occasions than one to Johnson, the Managing Director, who had threatened to resign, and start a mill of his own. He said that he believed that McRobert was at the bottom of the transfers; that he would use the transferees for his own ends, and that they would do what he told them; that he (Beer) had been a Director of the Cawnpore Woollen Mills, where there was always a preponderance of votes amongst the staff of that Mill, and he wanted to prevent a similar preponderance of votes on McRobert's part in the Muir Mills. "I considered," he said, "if McRobert gained that preponderance, Johnson (the Managing Director) would sever his connection with the Muir Mills, and it was thus that I considered it was not to the interest of the Company that the shares should be registered. I considered that McRobert evidently wanted to gain that preponderance * * * I don't think McRobert would hesitate to harass the management in order to gain his point. I considered harassment to the management would harm the Company."

The evidence of Dr. Condon, the only other witness called by the applicants, is not important. He speaks of a conversation with Johnson, which is denied by the latter.

Now although Butterworth was the only one of the applicants who gave evidence in support of their case, the counsel for the

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Company called the others apparently with a view to show that in purchasing their respective shares they were acting on the suggestion of and through McRobert. None of them had previously purchased shares in the Muir Mills Company, and with one exception all were at the time indebted to the Cawnpore Woollen Mills, but were allowed to further overdraw their accounts to meet the purchase money, and 7% was charged on the over-drafts. In each case the shares were offered to the purchaser by McRobert, were purchased by him, and paid for through him. Except in the case of Vickers, application for registration was made by McRobert, who was advising them throughout. Each of them stated that he was not prepared to say that the Directors did not fairly and properly consider the matter of their fitness to become member of the Company, but Thompson went so far as to say that while he believed they had not fairly and properly considered his application, he was not prepared to swear it. In the case of Thompson his shares were purchased during his absence in England for him by McRobert, who without consulting him, had caused his account to be debited with the purchase money. Vickers in his evidence stated that he knew that there was great antagonism between Johnson and McRobert, and that before he bought his shares he was aware of their hatred.

These matters which I have just mentioned, or most of them, only came to light in the course of this litigation, and therefore cannot be said to have influenced the Directors in their refusal to register the transfers. To my mind, however, they show almost conclusively that McRobert was taking much more than an impersonal interest in getting his employes to purchase shares in the Muir Mills Company. What his real object was there is nothing to show, though it may be that the view said to have been taken by the Directors as to his object was correct. It may be noted here that Beer was unable to specify, except in the vaguest terms, in what way McRobert was likely to be able to harass the management of the Company. It is admitted that at the time he was the largest shareholder in the Company, and it is to be presumed therefore that he would be the last person to do anything which would be likely to injure the interests of the shareholders. He had been a Director of the Company, but in February, 1897, he

ceased to be a Director, and though he was proposed and seconded for re-election as a Director at the Annual General Meeting of shareholders on the 27th February, 1897, he declined to submit himself for re-election. It is difficult to see how, as an ordinary shareholder, he could have interfered with or harassed the management, and he could not have submitted himself again for election as a Director until the next Annual General Meeting. Having regard to the constitution and views of the Board, and temporary Board, it was not likely that had a casual vacancy occurred on the Board, he would have been asked to join the Board in the meantime.

In his cross-examination Beer referred to a prosecution which had been instituted against him as a Director of the Company under section 55 of the Indian Companies Act, 1852, this being done apparently with a view to show how in one report McRobert had harassed the management. The prosecution was instituted under the following circumstances. After an Extraordinary General Meeting of the shareholders which took place in March, 1897, it appears McRobert asked to see the register of shareholders, and was told by Beer, who was the Chairman of the Meeting, that he could not be allowed to see it then, as it was required at once at an adjourned meeting of the Directors, but that he could see it the next day. McRobert thereupon left the meeting, but in the course of half an hour was informed that the register was available for his inspection. Notwithstanding this information McRobert instituted the prosecution referred to, alleging that he had been refused inspection of the register. The Magistrate who tried the case acquitted Beer. McRobert thereupon first directly, and then through the Chamber of Commerce, of which he was President, moved the Local Government to appeal to the High Court against the acquittal, which it did. In the result Beer was fined 8 annas, the High Court being of opinion that technically an offence had been committed.

The only other evidence which is material is that of Johnson, the Managing Director. He referred to various meetings which he described as stormy meetings at which there had been a difference of opinion between him and McRobert, when the latter was a Director, and especially to a particular meeting when McRobert

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had expressed distrust of the management of the Company. He also referred to the prosecution of Beer. As to the reasons for the refusals to register the transfers he said there was a belief that the transferees would in all probability prove themselves cantankerous and litigious, just as their employer (McRobert) had proved himself to be. It was considered that as they were his employes, he could rely on them to do whatever he wished them to do; that they would therefore act in any manner he wished or directed because of the ill-will he bore against him (Johnson) personally; and that the Directors wished to guard against anything of this sort. He further said "after that (the "criminal prosecution against Beer) all these applications came "in It appeared to me they could only mean one thing, namely, "that McRobert was determined to follow up these different "incidents by bringing in as shareholders his own nominees to "work in whatever way circumstances might direct."

The evidence of Johnson leaves no doubt in my mind that the real objections to the various transferees were (1) their connection as employes of the Cawnpore Woollen Mills with McRobert, and the personal animosity existing between Johnson and McRobert, and (2) the desire of the Directors that McRobert should not add to his voting power at the meetings of the Company. It was very candidly admitted by Mr. Moti Lal Nehru who appeared for the applicants that they were under the influence of McRobert, but he denied that they would necessarily vote as he might direct them.

The objections, it is to be observed, were not personal to the applicants themselves, and we have to see whether, under the circumstances, they were legitimate objections.

In the absence of any such provisions as Art. 21 of the Articles of Association in this case, Directors have no discretionary power of refusing to register a transfer of shares—See *Poole v. Middleton* (1), but where the power of rejecting proposed transferees is reserved to the Directors of the Company, they must exercise it reasonably and in good faith, and with due regard to the interests of the Company and to the right of a shareholder to transfer his shares, and the question of the fitness of the

(1) (1861) 29 Beav. 646, p. 650.

transferees must be fairly considered at a meeting of the Board. The principles to be gathered from the cases in England are summed up *in re Bell Bros.*: (1). In that case Chitty, J., said:—"According to the constitution of this Company, every shareholder is entitled to transfer his shares to any person not being infant, lunatic, married woman or under any legal disability. This right, which is a right of property, is subject to the discretionary power conferred on the Directors by Arts 18 and 34, of approving of the persons to whom the transfer is made, and of rejecting the transfer on the ground that they do not approve of the transferee. The discretionary power is of a fiduciary nature and must be exercised in good faith, that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly or fraudulently or arbitrarily or capriciously or wantonly. It may not be exercised for a collateral purpose. In exercising it the Directors must act in good faith in the interest of the Company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a Board meeting. When the Court once arrives at the conclusion that the Directors have in good faith rejected a transfer on the ground that the transferee is not a fit person to become a member of the Company, it will not review the Directors' decision. The Directors are not bound out of Court to assign their reasons for disapproving. If they decline to do so, or if their decision is challenged in Court and they refrain from giving evidence, upon which a cross-examination may take place as to their reasons, or if, giving such evidence, they refrain from stating their reasons, the Court will not, merely on that account, draw an unfavourable inference against them. In these articles there is an express provision protecting the Directors against any liability to disclose their reasons. They are, however, at liberty, if they think fit, to disclose them, and if they do, the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not, or, in other words, to ascertain whether the Directors have proceeded on a right or a wrong principle. If the reasons assigned are legitimate, the Court will not overrule the Directors' decision merely because the Court itself would not have

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(1) 7 Law Times Reports, 688.

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"come to the same conclusion. But if they are not legitimate, as, for instance, if the Directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his share by splitting them among his nominees, the Court would hold that the power had not been duly exercised. So, also, if the reason assigned is that the transferee's name is Smith, or is not Bell. Where the Directors do not assign any reason it is still competent for those who seek to have the transfer registered to show affirmatively, if they can, by proper evidence, that the Directors have not duly exercised their power." In the same judgment, Chitty, J., said:—"In my opinion, the power conferred on the Directors by the articles of this Company does not justify them in rejecting a transfer on the ground that the transferee, against whom they entertained no objection, is the nominee of some person whom they consider objectionable."

In *Ex parte Penney* (1), where the Articles of Association provided *inter alia* that "no person not already a shareholder shall be entitled to become the transferee of any share unless approved by the Board," it was said that the Directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the Board, and that in the absence of evidence to the contrary, the Court would take it for granted that they had acted reasonably and *bona fide*. But if there was evidence to show that the Directors had exercised their power capriciously or unfairly, the Court would interfere; and Mellish, L. J., pointed out that it would be an abuse of their power to object to register a transfer on any ground not applying personally to the transferee.

In *Moffat v. Farquhar* (2), the Articles of Association provided:—"No share in the Company shall be transferred by any proprietor to any person who has not been first approved of by the Board of Directors or the Committee of Directors appointed as aforesaid; and if any transfer of any share or shares shall be made or attempted to be made to any person who has not been approved, the same shall be void." There was a difference of opinion amongst the shareholders as to the mode in which the Company should be managed, and the plaintiff, who was a large

(1) (1872) L. R. 8 Ch., 446.

(2) (1877) L. R., 7 Ch. D., 591.

shareholder, transferred shares to his own nominees to strengthen his voting powers. The Directors refused to approve the transferees, not from any personal objection to them, but on the ground that the transfers were colourable and were intended to increase the plaintiff's voting power. It was held the Directors had no power to refuse to allow the transfers except upon objections personal to the transferees. That case was followed by Farran, J., in *Kaikhosro v. Coorla Spinning and Weaving Co.* (1).

In the applications before us, the lower Court has found and in that finding I agree, that due consideration was given by the Directors to the matter of the various transfers, but I am prepared to hold further that in rejecting the applications for registration they acted *bond fide* and as they believed in what they considered to be the interest of the Company. On the authorities quoted they were not bound on rejecting the applications to give their reasons, and as I have said, except in one case, they did not give their reasons. Evidence, however, has been gone into, and it now appears that the reasons upon which they acted were not personal to the applicants. It was in fact admitted that there was no objection to them personally, apart from their connection with McRobert. The objection was to McRobert, who, it was feared, would, from his position in the Cawnpore Woollen Mills Company, be likely to influence them to vote as he might wish. It should be here mentioned that the Muir Mills and the Cawnpore Woollen Mills were in no way rivals in trade, the one being a Cotton and the other a Woollen Mill. McRobert was not transferring his shares to his own nominees with a view to increasing his voting power in the Company, which, apparently on the authorities, he might have been justified in doing. He was merely influencing his subordinates to take shares which were being offered in the market. As the Directors have now disclosed their reasons, we are entitled to consider those reasons with a view to ascertain whether the Directors have proceeded on a right or wrong principle. The objections, as I have said, were not personal to the applicants, and applying the principles of the English cases, I think we must hold that the reasons now given for refusing to

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(1) (1891) I. L. R., 16 Bom., 80.

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register the transfer were not legitimate. If their reasons had been legitimate, we should not be justified in sitting "as a Court of appeal" to use the words of James, L. J., in *Ex parte Penney* (1) "from the deliberate decision of the Board of Directors to whom by the constitution of the Company the question of the determining the eligibility or non-eligibility of new members is committed."

In *In re Coal-port China Co.* (2) where the Court refused to interfere, there was no evidence to show that the Directors had exercised their power improperly or with want of *bona fides*.

Although, as I have said, I consider that the Directors of the Muir Mills Company duly considered the applications before them and in rejecting the applications for registration acted *bona fide*, and as they believed in the interests of the Company, yet the reasons upon which they based their refusal not being legitimate reasons, the Court has power to interfere, and I therefore think that the Court below was right in directing the Company to register the names of the applicants.

I would accordingly affirm the decrees of the Court below with costs in this Court in each case.

Appeal dismissed.

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July 5.

Before Mr. Justice Henderson.

HEM KUNWAR AND ANOTHER (PLAINTIFFS) v. AMBA PRASAD AND ANOTHER (DEFENDANTS) *

Civil Procedure Code, sections 368, 582, 591—Abatement of appeal—Order or decree—Order as to abatement of appeal embodied in the judgment and decree—Rules of the Court, Rule 9

Where one of four respondents (plaintiffs) in the lower appellate Court died, and no application was made within six months to put the legal representative on the record, and in the application that eventually was made the wrong person was named as legal representative: *Held*, the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died. Under the circumstances section 368 read with section 582 of the Code applied, and the proper order was to have directed the suit to abate: *Held* further, that where the order of the lower Court as to abatement was embodied in the judgment and decree,

* Second Appeal, No. 40 of 1900, from a decree of Syed Muhammad Tajam-ul Husain, Subordinate Judge of Aligarh, dated the 26th September 1899, modifying a decree of Munshi Anant Prasad, Munsif of Etah, dated the 6th January 1898.

(1) (1872) L. R., 8 Ch. 446 at p. 449

(2) (1895) L. R., 2 Ch., 404.

objection was properly taken thereto by way of second appeal against the decree *Sheo Nath Singh v Ram Das Singh* (1); *Sher Singh v Diwan Singh* (2), *Dharm Upadhyay v Raushan Chaudhary* (3); *Sant Lal v Sri Krishen* (4); *Chandarsang v Khimabhai* (5) referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad* and Pandit *Madan Mohan Malaviya*, for the appellants.

Munshi *Haribans Sahar*, for the respondents.

HENDERSON, J.—In this case four plaintiffs, Raj Bahadur, Musammat Mohni, Musammat Lachha Kunwar and Hem Kunwar, sued the defendants to recover possession of certain property to which they claimed to be jointly entitled. The Court of first instance gave the plaintiffs a decree from which the defendants appealed, making all four plaintiffs respondents.

Before the appeal came on for hearing, the appellants alleged that Musammat Mohni and Musammat Lachha Kunwar were dead, and upon their application Hem Kunwar was added a respondent, as the legal representative of the two respondents said to have died. When the appeal came on for hearing, Hem Kunwar satisfied the Court that Musammat Mohni was alive, and that he was not the legal representative of Musammat Lachha; and further, that the application to place him as their representative on the record was made more than 6 months after the death of the latter. No notice of the appeal had been served on Musammat Mohni, and upon that ground the lower appellate Court held that as against her the appeal could not proceed. With regard to Musammat Lachha, he set aside the order, which was an *ex-parte* order, by which Hem Kunwar had wrongly been placed on the record as legal representative of Musammat Lachha, and went on to say:—"The result is that under section 368 read with section 582 of the Code of Civil Procedure, the appellants' appeal against Lachha Kunwar, the deceased respondent, will fail." Thereupon, in the same judgment, he proceeded to deal with the appeal on the merits, and in the result made the following decree, namely, "that the appeal of the defendants-appellants be decreed as against the

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(1) (1895) I. L. R., 18 All., 19.

(2) Weekly Notes, 1900, p. 109.

(3) Weekly Notes, 1899, p. 136.

(4) (1892) I. L. R., 14 All., 221.

(5) (1898) I. L. R., 22 Bom., 718.

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plaintiffs-respondents, Raj Bahadur and Hem Kunwar only, and the Munsif's decree so far as it concerns them be set aside, and in place thereof it is decreed that the claim of the plaintiffs-respondents, Raj Bahadur and Hem Kunwar, be dismissed with costs, that the appeal of the defendants appellants be dismissed with costs as against the plaintiffs-respondents Nos. 2 and 3 (*i.e.* Musammât Mohni and Musammât Lachha Kunwar), and the Munsif's decree so far as it concerns them be upheld as it is." There was a further order as to costs which is immaterial in this case.

Against the decree of the lower appellate Court, Raj Bahadur and Hem Kunwar appealed on the following grounds, namely—
(1) because the appeal should have abated as the representatives of the deceased respondent Lachha Kunwar were not brought upon the record within the period of six months allowed by the Statute,
(2) because the trial of the appeal was contrary to the express provisions of section 368 of the Code of Civil Procedure. A preliminary objection was taken that these grounds were not directed against the decree of the lower appellate Court, and that the appeal was really an appeal against an order of the lower appellate Court under section 368, in effect, if not in terms, directing that the appeal should abate so far as Musammât Lachha Kunwar was concerned and not against the decree. I think there is no ground for this objection. The appeal, in my opinion, was against the decree. There was no separate judgment upon the matter of the death of one of the respondents who died. That matter and the merits of the appeal were dealt with in the same judgment, and the finding of the Court as to both was embodied in the decree. In substance the appellants before the Court impugned the decree on the ground that the trial of the appeal upon the merits was contrary to the provisions of section 368 read with section 582 of the Code of Civil Procedure, and that the decree made was therefore bad.

I think section 591 of the Code applies to this case. The decree of the lower Court was appealed against. This Court was asked to set aside the decree of the lower appellate Court on the ground that the trial on the merits was contrary to law; but even if the order that, by reason of the death of Lachha Kunwar, the

appeal against her failed, be treated as an order in the suit separate from the findings upon which the decree is based (which I do not think it is), then there is an objection which is taken and set forth as in the memorandum of appeal, that the appeal to the lower appellate Court ought to have abated altogether and not partially.

My attention has been drawn to the following cases:—*Sheo Nath Singh v. Ram Din Singh* (1); *Sher Singh v. Diwan Singh* (2); *Dhari Upadhia v. Raushan Chaudhri* (3); and to a Full Bench decision referred to in the first of these cases; but in the view I take of the present case I do not think that any of these cases apply, as I consider that in the present case there is an appeal directed against the decree of the lower appellate Court. Here no application was made within the time limited to place the legal representatives of Lachha Kunwar, the deceased respondent, on the record. The appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died, and under these circumstances, section 368 read with section 582 of the Code applied, and the proper order was to have directed the suit to abate.

In any case, in my opinion, there is no substance in the preliminary objection. Under the Rules of the Court (Rule 9) every memorandum of appeal must be headed "First Appeal," or "Second Appeal," as the case may be, and it was contended that this appeal, though headed "Second Appeal" as being an appeal from the decree of the lower appellate Court, dated the 26th September, 1899, was in reality a first appeal from an order made on the same date and embodied in the decree. I see no reason why, if that contention were right, the memorandum of appeal should not be amended. The misdescription was not one which could have taken the respondents by surprise, or otherwise prejudiced them. The stamp on the appeal, as a second appeal, is more than that required in an appeal from order. Moreover, I find I am supported in this view by a case reported in *Sant Lal v. Sri Kishan* (4). In the view which I take, however, it is not

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(1) (1895) I. L. R., 18 All., 19.
(2) Weekly Notes, 1900, p. 109.

(3) Weekly Notes,
(4) (1892), I. L. R.,

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necessary to amend the memorandum of appeal, and in my opinion the preliminary objection fails.

It was not suggested that if the decree of the lower appellate Court should be set aside, an opportunity should be given to the appellants in that Court to bring the representatives of the deceased respondent on the record as was suggested by the Court in *Chundarsung v. Khimabhar* (1). They had, it was found, by a mistake put a person on the record as representative, who was not in fact the legal representative of the deceased respondent, but even then the application to amend the record was made too late.

For the reasons which I have given, I think the proper order for the lower appellate Court to have made was to have directed the appeal to abate. I therefore allow this appeal and set aside the decree of the lower appellate Court. The result will be that the decree of the first Court will be restored. The appellants are entitled to their costs in this Court and the lower appellate Court.

Appeal decreed.

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July 7.

Before Mr. Justice Barends and Mr. Justice Aikman.
GANGA BAKSH AND OTHERS (PLAINTIFFS) v. RUDAR SINGH
(DEFENDANT).*

Civil Procedure Code, sections 294, 317—Indian Trusts Act (No. II of 1882), sections 82, 88—Purchase by alleged agent of decree-holder at sale in execution

Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance the decree-holders sued for a declaration that they were the real purchasers and for possession of the property.

* Second Appeal No. 997 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 22nd September 1897, reversing a decree of Bahu Bipi Behari Mukerji, Subordinate Judge of Aligarh, dated the 30th June 1896.

Held, that under such circumstances the second paragraph of section 317 of the Code of Civil Procedure did not exclude the application of the first paragraph of that section

Held further, that sections 82, 88 of the Indian Trusts Act (No 11 of 1882) did not apply.

Sankunni Nayar v. Narayan Nambudri (1) and *Kumbalanga Pillai v. Araputra Padinchi* (2) distinguished *Monappa v. Suiappa* (3) referred to.

THE facts are fully set forth in the judgment of Mr. Justice Banerji.

Babu *Jogendra Nath Chaudhri* and *S. C. Banerji*, for the appellants.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya* for the respondent.

BANERJI, J.—*Sujan Singh*, the father of the plaintiffs, held a decree against *Hina Singh* and *Sahib Singh*, which the plaintiffs put in execution. It is alleged by the plaintiffs, but denied by the defendant, that the defendant *Rudar Singh* was the agent and general attorney of the plaintiffs for the purpose of supervising the proceedings connected with the execution of the decree. It is further alleged that an application was made on behalf of the decree-holders under section 294 of the Code of Civil Procedure, for permission to purchase the property which was advertised for sale in execution of the decree, and that the application was refused on the ground that other decree-holders had taken out execution against the same property. This allegation is not traversed on behalf of the defendant. The plaintiffs further state in their plaint that after the refusal of the Court to grant them leave to bid at the sale, the defendant purchased the property in his own name, and made the deposit required by section 306 of the Code of Civil Procedure by raising money on the plaintiffs' credit; that subsequently the plaintiffs paid that money and the remainder of the purchase-money, and that the defendant agreed to convey the property to them after the confirmation of the sale. Objections were taken to the sale on behalf of the judgment-debtors but they were overruled, and the sale was confirmed, and a certificate of sale was granted to the defendant under section 316 of the Code of Civil Procedure. The sale took place on the

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(1) (1893) I. L. R., 17 Mad., 282. (2) (1895) I. L. R., 18 Mad., 436.
(3) (1887) I. L. R., 11 Mad., 234.

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20th August, 1891. It was confirmed on the 5th March, 1892, and the certificate of sale was granted to the defendant on the 11th March, 1892. The plaintiffs state that after the confirmation of the sale the defendant was asked to execute a sale deed, but he refused to do so, and that in April, 1895, he applied for partition of the property. It is thus clear that between the date of confirmation of sale and the date of the suit the defendant was admittedly in possession. In the 9th paragraph of the plaint the plaintiffs assert that they were the real purchasers of the property, and that the name of the defendant was entered as purchaser "*farzi*," that is, nominally. Upon these allegations the plaintiffs ask for a declaration that they are the real purchasers and that the defendant has without their permission got his name entered as purchaser, and they pray to be put into possession. The defendant denied that the purchase had been made by him on the plaintiffs' behalf and with the plaintiffs' money. He also pleaded the bar of section 317 of the Code of Civil Procedure. The Court of first instance granted the plaintiffs a decree, but the lower appellate Court has dismissed the suit on the ground that section 317 precluded the plaintiffs from maintaining it. The question we have to determine in this appeal is whether section 317 is a bar to the maintenance of the suit.

It is admitted that the defendant is the certified purchaser, but it is alleged that the plaintiffs are the real purchasers, and that the purchase by the defendant was made on their behalf. If that is so, the case clearly comes within the first paragraph of section 317, and by reason of the provisions of that paragraph the plaintiffs are precluded from maintaining the suit. It is contended on the plaintiffs' behalf that this is a case to which the second paragraph of section 317 applies, and for this contention reliance is placed on the words used in the prayer for relief, where the plaintiffs ask the Court to declare that the defendant has got his name entered in the sale certificate without the permission of the plaintiffs. No doubt in the prayer in the plaint the plaintiffs do ask the Court to make the declaration referred to above, but the case set out by them in the plaint is wholly inconsistent with the allegation that the name of the defendant was entered without

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the plaintiffs' consent. As has already been stated, I take the plaintiffs to assert that the purchase by the defendant was made without reference to them, that subsequently when the plaintiffs were informed of the purchase, they supplied the purchase-money, ratified what the defendant had done, and consented to take a conveyance of the property from the defendant after the sale had been confirmed in his name. They do not say in the plaint that when the defendant's name was entered in the sale certificate it was entered without their consent. On the contrary, they assert that it was entered nominally, that is, as *benamidar* for them. Upon such allegations it is not open to the plaintiffs to contend that the second paragraph of section 317 applies to the case. As they had been refused permission to bid, they could not possibly have said that their own name should have been entered in the sale certificate.

It is next contended on behalf of the plaintiffs-appellants that this is not a case of a *benami* purchase at all, and therefore section 317 has no application. This contention is not borne out by any of the allegations contained in the plaint, but is, on the contrary, opposed to what is stated in the 9th paragraph of the plaint. It is, however, urged that the plaintiffs have stated all the facts in the plaint, and that upon those facts the case which arises is that the defendant is the plaintiffs' agent, and has purchased the property as such with the plaintiffs' money, that this is therefore a case of a constructive trust, and that the plaintiffs are entitled to the benefit of the purchase made by the defendant, and must be deemed to be the purchasers of the property. Reliance is placed upon the provisions of section 88 of the Indian Trusts Act, 1882. That section contemplates the case of a person clothed with a fiduciary character, who by availing himself of his position, gains an advantage for himself. The foundation for the rule laid down in that section is that a person should not place himself in such a position that his duty may conflict with his interest. It is not asserted that the defendant was employed for the purpose of purchasing the property in question on behalf of the plaintiffs, and it is not alleged that it was within the general scope of his duty to make such a purchase. According to the plaintiffs, the defendant was employed as their agent for supervising the execution

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proceedings. In the performance of his duties as such agent, he was competent to purchase property on behalf of the plaintiffs in execution of that particular decree. But this he could not do unless the leave of the Court to bid and purchase had been obtained under section 294 of the Code of Civil Procedure. In this case leave was refused, and therefore neither the plaintiffs themselves nor the defendant as their agent could buy the property. It could not be said that it was the duty of the defendant to purchase the property in violation of the specific provisions of section 294, which forbids a purchase by the decree-holder without the express permission of the Court. When, therefore, the defendant purchased the property, no conflict could arise between his duty and his interest. He was in no different position from any other purchaser. Section 88, therefore, has no application. If the plaintiff's allegation be true that the money with which the purchase was made was their money, section 52 would have applied but for the proviso appended to that section. That proviso saves the operation of section 317 of the Code of Civil Procedure. Although, therefore, the plaintiffs may have paid the money with which the sale consideration was paid, since the certified purchaser was the defendant, it was not open to the plaintiffs to sue the defendant on the allegation that they were the real purchasers, and that the defendant had purchased the property on their behalf. It is a suit of this description which is contemplated by section 317, and it is the policy of that section to preclude the institution of such a suit. The analogy of a purchase by one member of a joint Hindu family in his own name on behalf of the other members of the family does not, in my opinion, apply in this case. In the case of a joint Hindu family the purchase itself is made by all the members of the family, including the person in whose name the purchase is made, and it is not a case of a purchase by a person who is not the real purchaser. The learned vakil for the appellants relied upon the ruling of the Madras High Court in *Sankunni Nayar v. Narayan Nambudri* (1). With what was said by Mr. Justice Best in his judgment in that case it is not easy to agree; but Mr. Justice Muttuswami Aiyar based his judgment upon the ground that the

(1) (1893) I. L. R., 17 Mad., 282.

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purchaser in that case was the agent of the plaintiffs, and had been employed as agent for the purpose of making the purchase on behalf of the plaintiffs. That was not a case in which the real purchaser was the decree-holder himself who had not obtained the permission of the Court to buy, and consequently would have infringed the provisions of the law if he had bid at the sale and purchased the property. That case is therefore clearly distinguishable from the present. Section 88 of the Trusts Act might be applicable to the case which was before the Madras High Court. The case of *Kumbalinga Pillai v. Ariaputra Padachi* (1), is also distinguishable. That was a suit for the specific performance of a contract by the auction-purchaser to convey the property to the plaintiff. Had this suit been a suit for the specific performance of the contract which the plaintiffs alleged the defendant had made with them to convey the property to them after confirmation of the sale, that ruling might possibly have been applicable. Even if the suit had been one for the specific performance of the alleged contract, it would still have been a matter for consideration whether such a suit would not be a suit the object of which was to defeat the provisions of law. But we need not consider the point, as the present suit is not one for the specific performance of a contract. The ruling in *Monappa v. Surappa* (2) has no bearing on the present case. In that suit the auction purchaser had delivered possession to the real purchaser, and had subsequently dispossessed him, and it was held that there was a waiver of right, and that the delivery of possession might amount to a transfer of title. For the above reasons the decree of the lower appellate Court is, in my opinion, right. I would dismiss the appeal with costs.

AIKMAN, J.—I am entirely of the same opinion. The plaintiffs, who were decree-holders, had tried to obtain permission of the Court to bid for the property advertised for sale in execution of their decree. That permission was refused. The property was then, it is said, purchased by the defendant as agent of the plaintiffs, and the sale was confirmed in his name. He therefore became a certified purchaser. The plaintiffs come into Court, alleging that the purchase was made with their funds, that they are the

(1) (1895) I. L. R., 18 Mad., 436. (2) (1887) I. L. R., 11 Mad., 234.

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real purchasers, and that the defendant's name was entered in the sale certificate fictitiously. It follows from this statement that the plaintiffs' suit is one which section 317 of the Code of Civil Procedure declares not to be maintainable unless the entry of the name of the certified purchaser was made fraudulently or without the consent of the real purchaser. In this case no allegation of fraud is made. In the relief the plaintiff, it is true, ask for a declaration that the defendant's name was entered in the certificate without their consent; but in the body of the plaint they lay no foundation for such a case. In fact, the statement in paragraph 6 of the plaint is quite opposed to the theory that the entry of the defendant's name in the sale certificate was made without the consent of the real purchasers, for in that paragraph the plaintiffs state that the agreement between them and the defendant was that after the sale had been confirmed in his name, he would execute a sale-deed of the property to them. In the face of this allegation it is impossible for the plaintiffs to maintain that the entry of the defendant's name was made without their consent. Further, such a contention on their behalf would at once have been met by a reference to the first paragraph of section 249 of the Code of Civil Procedure, which precludes a decree-holder from bidding for or purchasing a property sold in execution of the decree without the express permission of the Court. I entirely agree also with my learned brother in holding that the provisions of section 88 of the Indian Trusts Act, No. II of 1882, will not help the plaintiff. It cannot be said that there is any fiduciary duty on an agent towards his principal to assist him in evading the provisions of the law. It is, in my opinion, clear that the Legislature in framing the Trusts Act were careful that it should not in any way enable the provisions of section 317 of the Code of Civil Procedure to be evaded. This appears from section 4 and section 82 of that Act. I agree in the order proposed.

Appeal dismissed.

CRIMINAL REFERENCE.

1900
July 13.*Before Mr. Justice Blair.*

IN THE MATTER OF MADHO PERSHAD.*

Act No. XII of 1896 (Excise Act), section 49—License to sell spirits retail—Death of licensee before expiration of period of licence—Right of his heir and partner in business to continue sale—Personal nature of licence.

Held, that a licence for the retail sale of liquor under the Excise Act, No. XII of 1896, granted in the name of one man, does not on his death before the expiration of the period of the licence descend to his heir and partner in business so as to justify the said heir and partner in business in continuing to sell during the unexpired portion of the period named in the licence.

Where an order had been made for the sale of the liquor, part of which was, as above ruled, illegally sold by the accused: *Held*, that if the said liquor had by devolution or otherwise become the property of the accused, there was no reason why it should not be attached and sold.

THE facts of the case sufficiently appear from the judgment of the Court.

No one appeared.

BLAIR, J.—The District Magistrate of Mirzapur refers to this Court this conviction and sentence by a Magistrate, inflicted under section 49 of Act No. XII of 1896. He doubts the soundness of the conviction in point of law, and in the alternative suggests that as the offence is a purely technical one, the conviction and sentence should be set aside. I may add that an order has been made for the sale of the liquor, part of which has been held to be improperly retailed. The facts are that one Hira Lal, the uncle, as I understand, of the person convicted, whose name is Madho Pershad, held a licence for sale by retail of European spirits, which licence would be in force up to some time in September of the present year. Hira Lal died in the month of April, and it was after his death that Madho Pershad having no licence himself, made the illegal sale or sales of which he has been convicted. It is said, I know not with what truth, that Madho Pershad is Hira Lal's heir, and was his partner during his life. I do not think there is any doubt as to the technical soundness of the conviction. A licence is a personal grant, largely made for personal reasons,

* Criminal Reference No. 357 of 1900.

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and it certainly does not, after the death of the licensee, attach itself in any way to his property or devolve upon his heirs. I do not think Madho Pershad or any man of ripe years who had any connection with the traffic, could have sold the liquor without, at all events, grave doubt as to whether such sale was in violation of the law. I do not think that a fine of Rs. 50 inflicted upon a substantial man can be anything but a very small sentence for an offence which is punishable by four months' imprisonment or fine of one thousand rupees, or with both. I set aside the order of the Magistrate for the sale of the confiscated liquor, and instruct him to reconsider that question with a view to his arriving at a conclusion whether the liquor confiscated and ordered to be sold is the property of Madho Pershad. In that case I see no reason why he should not order attachment and sale of such liquor. If it is not by devolution or otherwise the property of Madho Pershad, it ought not to be confiscated and sold. Let the papers be returned.

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July 13.

APPELLATE CIVIL.

Before Mr Justice Knox, Acting Chief Justice, and Mr. Justice Blair.

RAM CHANDER (DEFENDANT) v. KONDO AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, sections 13, 244—Transfer of Property Act (No. IV of 1882) sections 88, 89—Decree not in accordance with judgment—Interpretation of decree.

Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage deed and this fact was apparently overlooked by the defendant who defended the suit, and where, while the judgment declared "that a decree be given against the hypothecated estate," in the decree the property affected was described as "the property specified in the plaint."

Held, that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither section 13 nor section 244 of the Code of Civil Procedure concluded the defendant from subsequently suing to recover the property wrongly included in the plaint.

THE facts of this case sufficiently appear from the judgment of the Court.

Mun hi Ram Prasad and Pandit Sundar Lal, for the appellants.

* First Appeal from Order No. 112 of 1899 from an order of Babu Prag Dass, Subordinate Judge of Saharanpur, dated the 10th July 1899.

Pandit *Moti Lal Nehru* for the respondents.

KNOX, ACTING C. J., and BLAIR, J.—The suit out of which this appeal arises has reference to a certain share of property which will in this judgment be referred to hereafter as share *A*. This share *A* is a share in mauza Gummawala, which belonged to Sri Ram, one of three brothers.

Sri Ram's brother, Nagar Mal, held a second share, which will be hereafter styled share *B*. A third brother, Sohan Lal, held a share, which will be described as $(\frac{c}{1} + \frac{c}{2})$.

Sohan Lal was succeeded by his son, Shankar Lal. Nagar Mal and Shankar Lal borrowed monies from one Bansilal, and as security mortgaged in his favour share *B* and $(\frac{c}{1} + \frac{c}{2})$.

Shankar Lal died and his property passed by succession thus:— $\frac{c}{1}$ to Sri Ram, $\frac{c}{2}$ to Nagar Mal. In execution of a decree against Nagar Mal, $\frac{c}{2}$ was sold and purchased by Kondo Mal, one of the respondents to this appeal. Kondo Mal is heir to Sri Ram, and thus held both the shares *A* and $\frac{c}{2} + \frac{c}{1}$.

Bansilal, however, brought a suit upon his bond and impleaded only Kondo Mal as the representative of his original mortgagors. Kondo Mal defended the suit, but apparently overlooked the fact that share *A*, or a portion of it, was included among the property sued for. Share *A* is not, and never was, included in the bond upon which Bansilal sued, and was not therefore property over which the bond held by Bansilal and upon which he sued created any charge or lien of any kind.

The judgment which was given in favour of Bansilal ran thus in its concluding clause: "that a decree be given to the plaintiff for Rs. 10,349-4-6 against the hypothecated estate, except that portion of it which is in the hands of Murli Lal and Lachmi Chand—i.e., share *B*." From the concluding words of the judgment and from other passages in it, it is evident that the intention of the Court was to grant a decree over the balance of the property hypothecated, and only that, viz., $\frac{c}{1} + \frac{c}{2}$ —share *B* being expressly excepted by name.

In the decree the property affected is described as the property specified in the plaint and as modified, to wit, by the

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exception of share *B*. Bansi Lal died and was succeeded by Ram Chander, the present appellant. He applied for an order absolute, and into this order absolute came the order for sale of share *A*, or a portion of it, as well as of share $\frac{c}{1} + \frac{c}{2}$. Ram Chander purchased.

Kondo Mal then instituted the suit out of which this appeal has arisen to recover the portion of share *A* which has been sold, on the ground that as it was never hypothecated, it could not have been included in the decree and could not have been sold.

The Court of first instance dismissed the suit on the ground that it was barred by section 13 of the Code of Civil Procedure. Kondo Mal should, in the judgment of the learned Munsif, have raised as part of his defence to the suit that no part of share *A* was ever hypothecated.

The learned Subordinate Judge overruling this decision, has remanded the case for a decision upon the merits, and it is from this order that the present appeal has been brought.

We agree with the learned Subordinate Judge that the Court which heard the first suit never intended to give a decree over any property other than that hypothecated, and that where the decree says "the property specified in the plaint" is meant, and must be held to mean, the hypothecated property mentioned in the plaint. The order absolute under section 89 could not run against any property over and above that against which the decree under section 88 ran. The present suit is concluded neither by section 13 or section 244 of the Code of Civil Procedure. To hold otherwise would not only be an act of injustice, but it would be permitting the plaintiff to take advantage of what he must know to be a piece of sharp practice, more than that, of fraud.

We dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1900
July 7.*Before Mr. Justice Blair and Mr. Justice Henderson.*

QUEEN-EMPRESS v. NIRMAL DAS AND OTHERS.*

Criminal Procedure Code, section 288—Previous statement to committing Magistrate retracted in Sessions Court—Use of such statement by Sessions Court as substantive evidence—Act No. 1 of 1872 (Indian Evidence Act), section 30—Confession of co-accused—“Taking into consideration”—Finding of arms and stolen property in joint family house—Evidence—Act No. XLV of 1860 (Penal Code), section 412.

Where a witness who has made a statement before the committing Magistrate subsequently resiles from that statement in the Court of Session, the statement made before the committing Magistrate can be used under section 288 of the Code of Criminal Procedure to contradict the witness; but the use of such statement as substantial evidence of the facts alleged by the witness on the prior occasion is fraught with the gravest peril, and could never have been the intention of the Legislature.

The words “take into consideration” in section 30 of the Indian Evidence Act, 1872, do not mean that the confession referred to in the section is to have the force of sworn evidence. *Queen-Empress v. Khandia* (1) referred to.

The bare finding of stolen property and arms in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction.

ONLY so much of the judgment is reported as is necessary to the points referred to in the head-note.

The Government Advocate (for whom Mr. W. K. Porter), for the Crown.

BLAIR and HENDERSON, JJ.—After setting forth the facts of an ordinary dacoity, continued as follows:—

The police do not appear to have obtained any clue for nearly a fortnight. They then began to make arrests, and upon the 12th February last and the succeeding days confessions were made by three of the present appellants—Nathu, Bhola (of Nagla Gulal) and Darola (of Ratu). The police also, on or before the date mentioned, had got into communication with one Genda, who afterwards appeared under a tender of pardon, and came before the Magistrate to give evidence for the prosecution. Three persons, other than those here as appellants, were committed, and upon trial were acquitted by the Sessions Judge. Upon the hearing in the Sessions Court, Genda, who had appeared before the

* Criminal Appeal No. 409 of 1900.

(1) (1890) L. L. R., 15 Bom., 66.

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Magistrate and given evidence for the prosecution, was called for the prosecution. He then said that he knew nothing about the dacoity, that the Collector did not offer him a pardon, and that he had heard nothing about it. The statement made before the Magistrate was put before him, and he admitted making it, but he said that it was all false, and that he was forced to make it. Upon the hearing in the Sessions Court, the evidence given by him before the Magistrate, which was put in to contradict the statement that he knew nothing about the dacoity, was used as substantive evidence against the appellants here. Against many of them there is no sworn evidence delivered in the Sessions Court at all. * * * * *

The cases of those appellants who have been convicted mainly upon what Genda swore before the Magistrate stand upon an altogether different footing, and the weight to be attached to the evidence of Genda requires careful consideration. He is the person who was called and accredited by the prosecution before the Magistrate. Upon being again called for the prosecution in the Sessions Court he flatly denied that he knew anything about the dacoity, and that he took any part in it. The Sessions Judge then confronted him with the statement he had made before the Magistrate, and he was compelled to admit that he had made such a statement, and alleged that he had done it under compulsion. It is that evidence before the Magistrate so repudiated by him that the prosecution has put forward as evidence to be believed and acted upon in the Sessions Court, and upon that evidence the Sessions Judge has thought it fair to act. As to the admissibility of that evidence to contradict his allegation that he knew nothing whatever about the dacoity, there can be no question; but the use of the allegations made by him before the Magistrate as substantial evidence of the facts alleged by him seems to us fraught with the gravest peril. The terms indeed of section 288 of the Code of Criminal Procedure, which render the evidence of a witness taken before the committing Magistrate capable of being treated as evidence in the discretion of the presiding Judge, are couched in the widest possible language; but we entertain the strongest opinion, in common with Mr. Justice Straight, that it never was the intention of the Legislature that the substance of such a

statement before the Magistrate, when retracted and repudiated, should be used by the prosecution as substantial evidence of the allegations made in it. It is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence if it stood by itself, and indeed as far as what is properly called evidence is concerned, Genda's repudiated statement is all that there is on the record to justify the conviction in several of the cases before us. Taken with this confession upon oath are the confessions made by certain of the appellants which it is our duty not to treat as evidence but to "take into consideration." It is not perhaps necessary or easy to define precisely what is meant by these words "taking into consideration." This, at all events, it must mean, that they are not to have the force of sworn evidence. Indeed it has been most definitely ruled in the Bombay High Court in *Queen-Empress v. Khandra* (1), that a conviction resting on such a confession alone cannot be maintained. In our opinion, therefore, no conviction in these cases can be sustained, which rests only upon the repudiated evidence of Genda and the statements made by the co-accused. Among the persons who have been convicted on such evidence are.—Nirmal Das, Darola (of Nagla Gulal) and Sanwalia.

We allow the appeals of these three appellants. We set aside their convictions and order them to be released.

The case against Ram Chandar, Bhao Singh and Jhamman, in so far as it rests upon the statement of Genda, has, in our opinion, no secure foundation, and the discovery of property and arms in the house jointly occupied by them together with Nathu falls, in our opinion, short of evidence of possession. There is nothing to show that they took or dealt in any way with any part of the stolen property, and we think that the bare finding of the property in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction. We may add that their brother Nathu has taken upon himself all the responsibility for the possession of the stolen articles; it was he who upon his own admission, took an active part in the dacoity and

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(1) (1890) I. L. R., 15 Bom, 66.

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brought the articles there: he expressly denied that his brothers had anything to do with the dacoity, and stated that the things found were his own share of the loot. We do not attach much importance to a statement of this kind, which would tend to exculpate his brothers, but we think that, apart from it, there is no evidence which would justify a conviction.

The Government have appealed against the acquittal of Narayan, the brother of Ram Chandar and Bhao Singh. Inasmuch as the evidence against him is limited to the discovery of property and arms in the family house, it is, in our opinion, impossible to support the appeal.

The appeal therefore against the acquittal of Narayan is dismissed, and the appeals of Ram Chandar, Jhamman and Bhao Singh are allowed. They will be at once discharged.

[WITH reference to section 288 of the Code of Criminal Procedure see further *Queen-Empress v Soneju* (1) and *Queen-Empress v. Jeochi* (2), and as to section 30 of the Evidence Act, *Empress v. Sundra* (3), *Empress v. Piria* (4) and an unreported case—Criminal Appeal No. 158 of 1900, decided on the 30th of April 1900—the material portions of the judgment in which are printed below.*—Ed.]

* This case has been submitted by the Sessions Court of Alighurh for confirmation of the sentence of death upon Dammar. There is also an appeal by Dammar. There are further appeals by Salig, Shibcharan, Behari and Param Sukh, who have been convicted of an offence under section 302 of the Indian Penal Code, but sentenced to transportation for life. Dammar is not represented before us. The other four appear by counsel.

On the 30th of September, 1899, Dan Sahai, mahajan, was undoubtedly murdered. The place where the murder happened was a mile distant from the village Lametha, where he lived. The medical evidence is that there were two wounds, one in front of the neck, the other on the back of the neck. Both wounds were caused by some heavy sharp-edged instrument, and could have been inflicted by the chopper produced in Court. There were two other wounds on the right side of the head. The Civil Surgeon states positively that there was no wound on the head, by which we understand on the skull. The police arrived on the spot on the 1st of October, and they lost no time in the investigation. The promptness with which the police action was taken in this case deserves commendation, and adds considerably to the value of the evidence which is the outcome of this investigation. One of the persons whom the police arrested

(1) (1898) I. L. R., 21 All., 175.
(2) (1898) I. L. R., 21 All., 111.

(3) Weekly Notes, 1884, p. 38.
(4) Weekly Notes, 1885, p. 320.

APPELLATE CIVIL.

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July 13.*Before Mr. Justice Knox, Acting C. J., and Mr. Justice Blair.*DARAB KUAR AND OTHERS (APPELLANTS) v. GOMTI KUAR,
(RESPONDENT).**Civil Procedure Code, section 493—Temporary injunction—"Other injury."*

Held, that words "or other injury" in section 493 of the Code of Civil Procedure do not include acts of trespass upon property.

THE application of the present appellant in the lower Court was headed "Application under section 493, Civil Procedure Code," and concluded with the following prayer:—

"Therefore it is prayed that by an *ad interim* injunction under section 493 of the Code of Civil Procedure the defendant be prohibited from realising the amount of decree of rent of the villages in suit and from otherwise interfering in the management of the properties in dispute either by herself or through her mukhtar-ams and karindas."

was the convict Dammar. He made a long and detailed statement, which was duly recorded by the Magistrate on the 4th of October. From that statement he afterwards resiled and said that it was brought about by malpractices on the part of the police. Of any such malpractices there is no evidence whatever, and we do not believe the allegation. The statement is in full detail. We have studied it more than once, and each time that we study it we rise from it with a conviction that it is in the main, if not wholly, an accurate account of what took place. In addition to this statement there is evidence on the record which presses strongly against both the accused Dammar and Salig. There is further evidence which, as far as it goes, tends to the conviction of the other three appellants, but so far falls short of proof that it is insufficient to prove participation in the act of murder. We shall shortly allude to this evidence. * * * * *

* * * It is at this point that we take into consideration the confession made by Dammar. The learned counsel for Shibcharan and other appellants contended that we could not use it unless there was evidence which, if believed, amounted to proof against his clients. We cannot accede to this contention. We are not prepared to define the exact extent to which, and the circumstances under which, such a confession may be used. The Legislature in using the words which it has placed upon the Statute book obviously intended to confer a wide discretion upon courts and to leave them to appraise the value of such a confession. We are not prepared to say that it might not have been used in the present case, and so far have supplemented the case against Shibcharan and Behari as to leave no room for doubt. * * * *

* First Appeal No. 41, of 1900, from an order of Munshi Sheo Sahai, Additional Subordinate Judge of Saharanpur, dated the 2nd March 1900.

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Babu Jogindro Nath Chaudhri, Pandit Moti Lal Nehru and Babu Satish Chandar Banerji for the appellants.

Babu Durga Charan Banerji and Pandit Sundar Lal for the respondents.

KNOX, ACTING C. J., and BLAIR, J.—This is an application for an injunction under section 493 of the Code of Civil Procedure. Section 493 applies to suits for restraining a defendant from committing a breach of contract or other injury. It is admitted that the case is not concerned with a breach of contract, but it is sought to construe the words “other injury” as words which might have reference to acts of trespass upon property. There is no authority for such a construction.

We dismiss the appeal with costs.

Appeal dismissed.

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July 16.

Before Mr. Justice Knox, Acting C. J., and Mr. Justice Blair.
MAHABIR PRASAD (OBJECTOR) v PARTAB CHAND (OPPOSITE
PARTY) *

Civil Procedure Code, section 244—Parties to the suit or their representatives—Purchaser at auction sale.

Where a decree-holder who had obtained a decree and order under sections 88, 89 of the Transfer of Property Act over certain property, proceeded to attach it in execution of his decree *Held*, that a third party who had bought the rights and interests of the judgment-debtors at an auction sale held in consequence of a money decree was not a legal representative of the judgment-debtors so as to entitle him to be heard under section 244 of the Code of Civil Procedure at the execution proceedings. *Sabhapati v. Sri Gopal* (1) followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2) distinguished.

THE facts appear sufficiently from the judgment.

Babu Parbati Charan Chatterji for the appellant.

Pandit Madan Mohan Malaviya, Babu Datti Lal and Babu Davendro Nath Ohdedar for the respondent.

KNOX, ACTING C. J., and BLAIR, J.—This appeal arises out of an application for execution of a decree. The decree-holder is one Rai Bahadur Partab Chand; the judgment-debtors are persons with whose names we are not concerned. The rights and interests, however, of these judgment-debtors in certain property were purchased at an auction sale held in consequence of a

* Appeal No. 10 of 1900, under section 10 of the Letters Patent.

(1) (1894) I. L. R., 17 All., 222, F. B. (2) (1892) I. L. R., 19 Cal., 683, P. C.

money decree. At that sale those rights and interests were purchased by Rai Bahadur Mahabir Prasad Narain Singh, the appellant. Upon Rai Bahadur Partab Chand attaching the same property over which he had obtained first a conditional decree under section 88, and then an order absolute under section 89 of the Transfer of Property Act, Rai Bahadur Mahabir Prasad Narain Singh intervened and asked to be heard as the representative of the judgment-debtors in Rai Bahadur Partab Chand's decree. His application has been rejected by both the Courts below; it has also been rejected by this Court upon the ground that a Full Bench of this Court in *Sabhajit v. Sri Gopal* (1) held that a purchaser at an auction sale is not a representative of the judgment-debtor, whose interests he has purchased, within the meaning of section 244 of the Code of Civil Procedure.

We should have thought the matter not open to any further question. The learned vakil, however, who appears on behalf of the objector, sought to establish that this Full Bench ruling was in derogation of what their Lordships of the Privy Council laid down in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). We have carefully examined that case: what was therein laid down was this—that when a question arises between the parties to a decree relating to its execution, discharge or satisfaction, the fact that the purchaser, who is no party in the suit, is interested in the result, has never been held as a bar to the application of section 244. This in no way affects what was held by this Court in *Sabhajit v. Sri Gopal* (1). In this case the parties to the suit were the parties to the proceedings; added to them was the purchaser, not as a representative of one of the parties, but as a looker-on interested in the result. Here the question which has to be decided is not one in which the judgment-debtor is any longer interested; in other words, it is not a question arising between the parties to the suit, and section 244 has no application.

We dismiss the appeal with costs.

Appeal dismissed.

(1) (1894) I. L. R., 17 All., 222, F. B. (2) (1892) I. L. R., 19 Cal., 683, F. C.

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MAHABIR
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July 16.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

BENI MADHO DAS (PLAINTIFF) v. KAUNSAL KISHOR DHUSAR
(DEFENDANT) *

Act No. IX of 1872 (Indian Contract Act), section 30—Loan to facilitate gambling—Loan to aid in paying off gambling debt—Contract not tainted with immorality.

Held that the fact that the object with which the plaintiff lent money to the defendant was to enable him to pay off a gambling debt, did not taint the transaction with immorality so as to disentitle the plaintiff to recover.

THE facts appear sufficiently from the judgment of the Court.

Pandit Moti Lal Nehru and Babu Durga Charan Banerji
for the appellant.

Mr. Dwarika Nath Banerji for the respondent.

BURKITT and HENDERSON, JJ.—In this case we are unable to concur with the decision of the lower appellate Court.

The facts briefly are that, on the 20th November 1896, several persons, including the defendant-respondent—persons described by the lower appellate Court as being men of high social standing and considerable wealth—met together at the house of the plaintiff-appellant, and gambling ensued; but in that gambling the plaintiff-appellant took no part whatsoever. From time to time it would appear that the defendant-respondent lost certain sums of money, and in order to pay those he borrowed from the plaintiff up to Rs. 4,000, which he promised to repay. This fact is distinctly found by the lower appellate Court, which finds that the money was borrowed by respondent to pay his gambling debts. The lower appellate Court very properly finds that the agreement between the plaintiff and defendant was not by way of wager, and therefore not void under section 30 of the Contract Act; and it further finds that the agreement by the defendant-respondent to repay Rs. 4,000 was in consideration of that sum having been lent to him at his request by the plaintiff; and the Court further found that that consideration as it stood was not in itself unlawful or immoral. On those findings one would have expected that the lower appellate Court would have given a decree to the plaintiff. The learned District Judge, however, came to the conclusion that

* Second Appeal No. 430 of 1898, from a decree of Mr. E. O. E. Leggatt, District Judge of Mirzapur, dated the 6th April 1898, reversing a decree of Babu Jai Lal, Officiating Subordinate Judge of Mirzapur, dated the 10th May 1897.

the general object of the plaintiff in lending money was to facilitate gambling, and that every loan had this object in view, and every agreement to repay carried the same taint; and each contract had as its general defect the facilitation and promotion of gambling at the plaintiff's house.

In those remarks we are unable to concur with the learned Judge of the Court below. The object of the one series of transactions with which we are concerned here was to enable the respondent to pay off his gambling debt as is found by the Court below. The consideration for the agreement was the promise made by the defendant to repay the money on demand. We do not see how the remarks of the Judge as to the general object the plaintiff had in lending the money affects the case. The Judge finds that the object or the consideration—for they are only different names for the same thing seen from a different point of view—was not of itself unlawful or immoral. In our opinion to lend money for the purpose of paying off a gambling debt with a knowledge of it being applied for payment of such a debt cannot be considered to be an immoral act. We think the Court below ought not to have reversed the judgment given in favour of the plaintiff by the Court of first instance. We therefore allow this appeal and restore the decision of the Court of first instance. Appellant is entitled to his costs in this Court.

Appeal decreed.

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DAS
KAUFAL
KISHOR
DHUSAR.

Before Mr Justice Banerji and Mr Justice Akman.

WAHID-UN-NISSA AND OTHERS (DEFENDANTS) v GOBARDHAN DAS
(PLAINTIFF) *

1900
July 16.

*Mortgage—Puisne mortgagee not made party to suit by prior mortgagee—
Subsequent suit by puisne mortgagee—Apportionment of redemption
money—Third parties, purchasers.*

A prior mortgagee, K, obtained a decree in a suit upon his mortgage, to which suit a puisne mortgagee, G, was not made a party, and subsequently one, B, attached the decree, and, having put up the property for sale, purchased it himself. G, the puisne mortgagee, having brought a suit for redemption of K's mortgage and sale of the property, K sold his rights to P, who was thereupon added as a defendant. G obtained a decree for redemption and sale.

* Second Appeal No 832 of 1897 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 6th August 1897, modifying a decree of Babu Anant Ram, Subordinate Judge of Aligarh, dated the 30th September 1896.

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Held per Baneji, J., that *P* was entitled to the whole amount which *G* had to pay for redemption of the prior mortgage, with the exception of the amount of the purchase-money paid by *B* at the auction sale, which amount, and which amount only, would be due to *B* or his representatives. *Dip Narain Singh v Hara Singh* (1) and *Baldeo Bhartha v Hushiar Singh*, (2) approved.

Held per Aikman, J., that the auction purchaser, *B* (or his representatives), was entitled to the whole amount to be paid by *G* for redemption of the first mortgage. *Dip Narain Singh v Hara Singh* (1) dissented from, and *Baldeo Bhartha v. Hushiar Singh*, (2) distinguished.

THE facts of the case sufficiently appear from the judgment of either of their lordships.

Messrs. *Abdul Raoof* and *Karamat Husain* for the appellants.

Mr. *D. N. Banerji*, Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Pandit *Moti Lal Nehru* for the respondent.

BANERJI, J.—This appeal has been brought in a suit which arose out of the following facts:—

On the 19th April, 1878, Mussammats Habiban and Bina made a simple mortgage of 544 bighas 2 biswas in favour of Kaim Ali Khan, Mazhar Ali Khan and Nazar Ali Khan for Rs. 1,500, and on the 29th January, 1886, Habiban alone mortgaged a fourth share of the same property to one Gobind Ram. She subsequently made two other mortgages, to which it is not necessary to refer.

The first mortgagees brought a suit upon their mortgage against one of the mortgagors and the heirs of the other, and obtained a decree for sale on the 1st August, 1889. The decree is No. 72 of 1889, and the amount of it was Rs. 3,306-14-6. The puisne mortgagees were not joined as parties to the suit.

Bansidhar, one of the defendants in the present suit, held a simple decree for money against Kaim Ali and others, the first mortgagees, and in execution thereof caused the aforesaid decree to be attached. As attaching creditor he took out execution of the decree, caused the mortgaged property to be sold by auction on the 24th March, 1894, and purchased it himself for Rs. 1,050. On the 24th November, 1894, he sold the said property to Wahid-un-nissa and Jan Muhammad, defendants, for Rs. 4,400, and

(1) (1897) I. L. R., 19 All., 527. (2) Weekly Notes, 1895, p. 46.

those persons, on the same date, made a usufructuary mortgage of it to Dungar Singh and others, defendants, fourth party, for Rs. 6,000. These defendants are admitted to be in possession of the property.

Gobind Ram, the second mortgagee, brought a suit for sale upon his mortgage, and obtained a decree on the 23rd February, 1892. When, in execution of that decree, he sought to bring the mortgaged property to sale, he was not permitted to do so by reason of the prior sale of the 24th March, 1894. He thereupon assigned his decree to the present plaintiff, Gobardhan Das, on the 4th November, 1894, and the latter, as the assignee of the decree, brought the present suit on the 7th December, 1894.

The ground of his claim is that, as Gobind Ram was not made a party to the suit brought by the first mortgagees, the decree obtained in that suit, and the auction sale held in execution of the decree, are not binding on him; that, as subsequent mortgagee of the property, he had still the right to redeem the first mortgage, and that by virtue of the assignment made to the plaintiff, the plaintiff is entitled to redeem the said mortgage. He prayed for a decree for redemption of the mortgage of 1878 upon payment of Rs. 1,050, the amount of sale consideration paid for the mortgaged property, or such other sum as the Court might declare to be payable, and for possession of the property comprised in the first mortgage.

On the 17th December, 1894, that is, after the institution of the present suit, the first mortgagees, Kaim Ali and others, conveyed to Prasadi Lal all their rights under the mortgage of 1878, and the decree obtained upon that mortgage. Prasadi Lal was thereupon added as a defendant to the suit and is now arrayed as defendant, fifth party.

Wahid-un-nissa and Jan Muhammad denied the right of Gobind Ram and the plaintiff to redeem the first mortgage and asserted that as Gobind Ram was the mortgagee of only one-fourth of the property, the claim to redeem the remaining three-fourths was not maintainable and that redemption could take place, if at all, upon payment of the whole amount due under the mortgage of 1878, which they alleged to be Rs. 9,182-0-6, and not upon payment of the sale price.

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The defence of Dungar Singh and others, mortgagees from the above defendants, was very similar, the only difference being that they alleged a larger sum to be due upon the first mortgage.

Prasadi Lal urged that the plaintiff was not entitled to redeem except upon payment of the whole amount due upon the mortgage, and he claimed to be entitled to the whole of that amount with the exception of Rs. 1,050, the amount of consideration paid by Bausidhar.

The Court of first instance was of opinion that as Gobind Ram was the mortgagee of a fourth share of the property, the plaintiff was entitled to redeem that share only, on payment of a fourth part of the mortgage money, which the parties admitted amounted to Rs. 10,000 on the date of the decree of that Court. The claim for possession was dismissed, and a decree was made for sale upon payment of Rs. 2,500, to which it declared Prasadi Lal not to be entitled.

From this decree the plaintiff appealed, and Prasadi Lal preferred objections under section 561 of the Code of Civil Procedure.

The lower appellate Court referred certain issues to the Court of first instance under section 506 of the Code, and ultimately held that the plaintiff was entitled to redeem the whole of the property in suit upon payment of Rs. 10,000 admitted to be due upon the first mortgage on the 30th September, 1896, and further interest on the said amount up to the date of the decree of the appellate Court. The learned Judge next proceeded to consider the respective rights of the rival defendants to the said amount, and came to the conclusion that the present appellants were entitled to Rs. 1,050 paid by Bausidhar and interest on that amount, and that Prasadi Lal, as representing the first mortgagees, was entitled to the balance. He also held that the plaintiff should be granted a decree for sale, and accordingly made the decrees from which this appeal has been preferred.

Various pleas were taken in the memorandum of appeal, but most of them have been abandoned. The pleas which the learned counsel for the appellants has urged before us are the third, the sixth and the seventh.

It is contended that, as the suit was one for redemption, a decree for sale should not have been made. This might have been a valid plea had the appellants not submitted to the decree for sale made by the Court of first instance. They did not appeal from that decree, and it appears from the judgment of the lower appellate Court that in the first Court they consented to a decree for sale being passed. Further, as the plaintiff, as representing the puisne mortgagee, is not entitled, according to the rulings of this Court, to sell under his mortgage without redeeming the prior mortgage, and as the ultimate object of his suit was that he might be in a position to sell under his mortgage, a decree for sale in the present suit would not prejudice any of the parties, and would prevent further litigation. I am not therefore prepared to accept this plea of the appellants.

The seventh plea, which is to the effect that Prasadi Lal, defendant, had no *locus standi* in the suit is, in my opinion, untenable. As has been already stated, the decree obtained by the first mortgagees, Kaim Ali Khan and others, on the first August, 1889, upon their mortgage of the 19th April, 1878, was for Rs. 3,306-14-6. Bansidhar, who caused that decree to be attached and the mortgaged property to be sold, realized Rs. 1,050 only out of the amount of that decree. This sum appears to have sufficed to satisfy his own decree, but a large amount was still due upon the decree to which the first mortgagees, Kaim Ali Khan and others, were entitled. Both parties admitted in the Courts below that Rs. 10,000 was recoverable under the said decree. It cannot therefore be said that the first mortgagees had no right left which they purported to transfer on the 17th December, 1894, to Prasadi Lal. After the sale, which Bansidhar caused to be effected on the 24th March, 1894, the first mortgagees had subsisting rights under their decree of the 1st August, 1889; and as they transferred those rights to Prasadi Lal, the latter has stepped into the shoes of the first mortgagees, and is now their representative in interest. This representative status of Prasadi Lal was, I may observe, never questioned in either of the Courts below, and no issue was raised on that point. The only question which was discussed in the lower appellate Court as affecting Prasadi Lal was, whether he was entitled, as the representative

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of the first mortgagees, to any part of the mortgage money which the plaintiff was bound to pay for redeeming the first mortgage. That is the question to which counsel on both sides chiefly confined their able and elaborate arguments in this Court, and that is the principal question which we have to determine in this appeal.

In my opinion it was not necessary, for the purpose of granting the relief to which the plaintiff was entitled, to determine the rival claims of the persons who alleged that they were entitled to the mortgage money. It was enough for the plaintiff to pay that money into Court, leaving it to the claimants of that money to have their respective rights to it determined in a suit of their own. This would have obviated the necessity of following the ordinarily unusual course of determining the rights *inter se* of persons arrayed in the suit as co-defendants. However, as the lower appellate Court has apportioned the mortgage money between different sets of defendants, and as both parties desire that the matter should be determined in this suit so as to avoid further litigation, I do not think we should decline to decide the question of apportionment.

The learned Judge of the lower appellate Court has held that as the purchase of the mortgaged property by Bansidhar, whom the appellants before us represent, discharged the decree obtained by the first mortgagees upon their prior mortgage to the extent of Rs. 1,050 only, and as a large portion of the amount of that decree still remains unsatisfied, the present appellants are entitled only to the aforesaid sum of Rs. 1,050 and interest thereon, and that the balance of the mortgage money should be paid to Prasadi Lal, who now represents the first mortgagees. In support of that view he has referred to some observations made by my brother Aikman and myself in our judgment in the case of *Deo Narain Singh v. Hira Singh* (1). In that judgment we said:—"Had a third party purchased the property and had his purchase money discharged the prior mortgage in full, he would undoubtedly have been entitled to claim that a subsequent mortgagee who, by reason of his not being a party to the prior mortgagee's suit, had the right to redeem him, must pay him the full amount of the prior

(1) (1897) I. L. R., 19 All., 527.

mortgage. But if the purchase money paid by such a purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole amount of the prior mortgage. The subsequent mortgagee would, in our opinion, have to pay the full amount due upon the prior mortgage; but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of the mortgage money is due. When there are more purchasers than one, the apportionment should be made between them *pro rata*, and the balance should go to the mortgagee." These observations fully bear out the conclusion of the learned Judge, which is further supported by the ruling of Edge, C. J., and myself in *Baldeo Bharthi v. Hushiar Singh* (1). If the view expressed in the above cases is correct, the apportionment ordered by the Court below is unimpeachable, and this appeal must fail. It is, however, argued that the question before us did not directly arise in, at least, the first of the two cases referred to above, and being thus an open question, should be considered and decided by us again. This is no doubt true, but I consider it highly inexpedient that the decisions of the highest Court in the Province should be frequently altered, and title acquired on reliance on those decisions thus unsettled and shaken. Unless, therefore, it is established that a decision already given after careful consideration is grossly erroneous, I should be loath to depart from it, even if its correctness may be open to question, and even if the opinion expressed in it is only *obiter*. It is contended that the view taken in one of the two cases mentioned above by my brother Aikman and myself, and that taken by Sir John Edge and myself in the other, are erroneous and not warranted by law. No case, reported or unreported, has been cited to us in which this or any other High Court has held or expressed a different opinion, and no authority has been referred to which bears directly on the point and shows conclusively that this Court erred in making the observations contained in the judgments pronounced in the two cases mentioned above. Speaking for myself, I must say that I have heard nothing in the argument addressed to us which induces me to alter the opinion I

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(1) Weekly Notes, 1895, p. 45.

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have already expressed on the point, and to think that it is contrary to any specific provision of law, or to any rule of justice, equity and good conscience, according to which the Courts in these Provinces are bound to act. And I may add that after an anxious consideration of all that has been said in this case I still adhere to that opinion.

I need hardly mention that in every suit for sale brought by a prior mortgagee a puisne mortgagee, of whose interests the plaintiff has notice, should, under section 85 of the Transfer of Property Act, 1882, be joined as a party in order that he may be afforded an opportunity to exercise the right of redeeming the prior mortgage which, as subsequent mortgagee, he possesses. Where, therefore, a prior mortgagee has obtained a decree for sale without making the subsequent mortgagee a party to his suit, the right of redemption of the latter does not become extinct and he is entitled to exercise it even after a sale has taken place in execution of the decree obtained upon the prior mortgage. He must, according to the rulings of this Court, "be placed in the same position he would have held had he been a party to that litigation." Having been relegated to the position which he would have occupied had he been a party to the suit, he could redeem the prior mortgage only upon payment of the whole amount due upon the mortgage. Thus is conceded on both sides, and is what was held in *Dip Narain Singh v. Hira Singh* (1). When such payment is made after a sale has taken place under the first mortgagee's decree, the question arises—Who is entitled to the amount paid? That is the question which we have to decide in this appeal.

There can be no doubt that if the first mortgagee himself has purchased the mortgaged property, he alone is entitled to the mortgage money. It is also beyond question that if a stranger, *i. e.*, a person other than the mortgagee, becomes the purchaser, and the price paid by him fully satisfies the amount of the mortgage debt, the whole of the mortgage money should go to him alone, the mortgagee having no longer any right to that money. It is contended that he would be equally entitled to the whole of the mortgage money even if the price paid by him satisfied the

(1) (1897) I. L. R., 19 All., 527.

mortgage only partially. The reasons advanced in support of this contention are, that upon the making of an order for sale under section 89 of the Transfer of Property Act, 1882, the mortgage security becomes extinct; that after an auction sale has taken place in pursuance of the order, the mortgagee ceases to have any right in respect of the property sold; that the rights of the mortgagor and mortgagee pass to the purchaser, and that therefore, upon redemption, the purchaser alone is entitled to the mortgage money. In the first place, this argument assumes that the purchaser is in substance an assignee of the mortgage, which he certainly is not. In the next place, it overlooks the very nature of a mortgage and the rights of the mortgagee. Every mortgage presupposes the existence of a debt, and it is for the purpose of securing the repayment of the debt that a mortgage of property is made. In every simple mortgage, unless there is a specific covenant to the contrary, there is a personal obligation upon the mortgagor to pay the debt, and there is also the liability of the mortgaged property for the debt. So that the security for the debt is two-fold, namely, first, the personal security of the mortgagor, and next, the security of the property. The liability of each kind of security is to the extent of the whole amount of the debt. It is for this reason that, when a person entitled to redeem seeks to redeem the mortgage, he must pay the whole amount due for the time being upon the mortgage. It is for the same reason that when the proceeds of the sale of the mortgaged property are insufficient to pay the amount due on the mortgage, the mortgagee is declared entitled to obtain under section 90 of the Transfer of Property Act a decree for the balance, provided, of course, that his right to the balance has not been extinguished by the operation of limitation or for any other reason. The debt, that is, the principal money advanced by way of loan and interest thereon, called the mortgage money in section 58 of the said Act, being the sum which must be paid in order to obtain redemption, the creditor, that is, the mortgagee, is the person who would ordinarily be entitled to get that sum. If a person other than the mortgagor entitled to make such payment, *e. g.*, a purchaser of the mortgaged property, has paid off the whole amount of the debt, he, and not the mortgagee, would be entitled to the whole of the

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money paid for redemption. But if such other person has paid only a part of the debt due to and recoverable by the mortgagee, I fail to see under what principle of law or equity he would have the right to appropriate any sum in excess of the amount paid by him. If the appellants' contention is correct, such person would be entitled to the whole of the money paid for redemption. As, however, in the case supposed, a part only of the debt due to the first mortgagee had been discharged, the right of the first mortgagee to recover the balance due to him would still subsist. When, therefore, he realizes the amount of the balance, as he is entitled to do, the result will be that the amount of the same debt will have been recovered twice over—a result which no Court of Justice should countenance or sanction. Another and a more serious anomaly will arise if the appellants' contention be accepted. The subsequent mortgagee who redeems a prior mortgage is entitled to add to the amount of his own mortgage the amount of the prior mortgage and to recover the total sum from his mortgagor and the mortgaged property. If the proceeds of the sale of the mortgaged property prove insufficient for the realization of that sum, he will be able to recover the balance from the mortgagor by obtaining a decree under section 90 of the Transfer of Property Act. If the whole amount of the prior mortgage be paid to the purchaser of the property, the first mortgagee, whose debt would remain unsatisfied, would, according to the learned counsel for the appellants, also have the right to realize, by means of a decree under section 90, the balance due to him. This right, the learned counsel said, was a safeguard of the interest of the first mortgagee. So that the mortgagor may have to pay the same amount twice over, that is, once to the first mortgagee and again to the subsequent mortgagee. I need hardly say that I do not feel myself justified in adopting a view which will work such injustice.

If, again, we turn to the case of the mortgagee, similar injustice will be done to him in the event of the whole of the mortgage money being paid to the auction purchaser. When the subsequent mortgagee has redeemed the first mortgage by paying into Court the whole of the purchase money, the first mortgagee is not, in my opinion, entitled to obtain a decree under section 90, on the ground that he has realized by the sale of the mortgaged property

only a part of the debt ; for when the mortgage has been fully redeemed by payment of the mortgage money into Court, it cannot possibly be said that a balance is still due upon the mortgage. The consequence will therefore be that, although the first mortgagee to whom a portion of the debt is due has not actually realized it, he will be wholly without a remedy in respect of that portion.

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Now, let us see whether the view adopted by the learned Judge will lead to similar injustice or anything approaching it. The learned Judge has directed that the appellants should get the amount which Bansidhar, their predecessor in title, paid for the property, and interest on that amount from the date of his purchase. He has thus awarded the sum by which the purchaser was actually out of pocket. The purchaser has suffered no loss, and his only loss, if it may be called a loss, is that of the gain which he expected to derive from an apparently speculative purchase. When property is purchased under circumstances similar to those of the present case, the purchaser makes his purchase subject to the risk of its being defeated by the second mortgagee who was omitted from the first mortgagee's suit, and to the risk of his having to surrender the property upon the first mortgage being redeemed by the puisne mortgagee. It is not likely that a purchaser under such circumstances would pay full value for the property. If he has to give up the property for which, in the ordinary course of things, he must have paid inadequate value, and he is compensated by the payment to him of the money which he paid as the value of the property, I do not see what any hardship is done to him. If the property is of large value, sufficient to cover the amounts payable under both the first mortgage and the second mortgage, and he prefers to retain it and for that purpose has to pay the amounts of the two mortgages, he suffers no loss, because he receives back the amount of the purchase money already paid by him, and for the balance he gets an adequate equivalent in the property itself. The present case appears to me to be an apt illustration in point. Bansidhar purchased the property in question after Gobind Ram, the second mortgagee, had obtained his decree. That decree was apparently in course of execution when the auction sale at which Bansidhar

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purchased took place, for we find that the said sale was confirmed after the postponement of the sale which had been ordered in execution of Gobind Ram's decree. Bansidhar, who, as attaching creditor, was himself executing the decree obtained on the first mortgage, must have known that in making the purchase he was undertaking a risk, namely, that of the sale being ignored by Gobind Ram, who was not a party to the first mortgagee's suit. He paid for the property a price which was evidently much below its proper value. He himself sold it immediately afterwards for more than four times the value he had paid for it, and it appears to have been admitted in this suit that the property was well worth Rs. 10,000. A person who purchased property of such value for Rs. 1,050 only cannot reasonably complain if he has to surrender the property upon getting back what he actually paid. And the appellants are in no better position than the person from whom they derive their title. It is true that if, under such circumstances, the purchaser has to surrender the property, he derives no benefit, but as he sustains no loss and as the benefit he expected to derive was that arising from a speculative purchase, he is not entitled to any sympathy. In my opinion the mode in which the Court below has apportioned the mortgage money is more in consonance with justice and equity than that contended for on behalf of the appellants.

It is strenuously argued on behalf of the appellants that after the sale under the first mortgage the first mortgagee ceased to have any right to the property, that it is because the property has passed to the purchaser and he objects to its being sold in satisfaction of the second mortgage that the second mortgagee is under the necessity of redeeming the first mortgage, that the mortgage money paid by the second mortgagee is paid by him in order to make the property available to him for the realization of the amount of his mortgage, and that the person who holds the property is therefore the only person who is entitled to the mortgage money paid by the second mortgagee. It is further urged that when the mortgagee asks for any portion of that money he seeks to resort to a source which he has already exhausted by causing the property to be sold. This contention might probably

have been valid had the property been the only security for the mortgage debt, and the only source from which that debt could be recovered. But as has been already said, the security for the mortgage debt is, in the absence of a specific contract to the contrary, not only the security of the property, but also the personal obligation of the mortgagor to pay the debt, and the liability for the whole amount of the debt attaches to each of these securities.

A puisne mortgagee who was not a party to the first mortgagee's suit and had no opportunity of redeeming the first mortgage has to pay the full amount of the debt because he is bound to pay the amount which he would have had to pay had he been made a party, and there can be no question that he would have had to pay the full amount of the mortgage money due for the time being, inasmuch as that amount would have been recoverable from the property also. Where the first mortgagee has realized only a part of the debt by the sale of the property, that is, by enforcing the security of the property, there is still a balance due to him which he can realize by enforcing the other security. It follows that when the subsequent mortgagee pays the full amount of the debt and thereby totally discharges the debt, the person to whom the balance is due, that is, the first mortgagee, is the person who has the right to appropriate that portion of the money paid by the subsequent mortgagee which represents the balance, the purchaser whose purchase money has satisfied the remainder of the debt being entitled to the remainder of the money paid by the subsequent mortgagee. There can be no doubt that if in such a case the purchaser cannot hold up the payment made by him as a shield for his protection to the full extent of the mortgage money, he is not entitled to the whole of that money. It is, however, said that such a purchaser is entitled to use the first mortgage as a shield to the extent of the whole amount of that mortgage, but no authority has been cited in support of this contention. The contrary view was held in *Baldeo Bharthi v. Hushiar Singh*, (1). It does not appear to me to be reasonable that the purchaser should be awarded an amount which he never paid. The money paid by the second mortgagee does not

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(1) Weekly Notes. 1895. p. 45.

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consist of the proceeds of the mortgaged property, nor is it paid as an equivalent of the value of the said property. That money cannot, therefore, be regarded as derived from the source which has already been exhausted by the auction sale which has taken place in execution of the first mortgagee's decree. This case is not a case in which, under the contract of mortgage, the property was the only security for the debt. The second mortgagee, it is true, pays the mortgage money because of his interest in the property, but, as has been already pointed out, he does not pay it as solely representing the value of the security of the property. The fact of his ignoring the auction sale and offering to redeem the first mortgage does not revive the debt, because the debt had never been extinguished, and it is not on the ground of the revival of the debt that the first mortgagee can get the balance due to him. A comparison of the provisions of section 89 of the Transfer of Property Act with those of section 87 shows that an auction sale of the mortgaged property does not extinguish the debt, although it extinguishes the security as between the mortgagor and the mortgagee. No doubt the first mortgagee cannot proceed against the mortgaged property any longer, but I see no reason why he should be deprived of the money which is undoubtedly due to him because the person who purchased the mortgaged property took with his eyes open a defeasible title, and evidently paid for the property a value much below the value which it would otherwise have fetched. For the above reasons I see no valid grounds for departing from the view which my learned colleague and myself expressed, after careful and mature consideration, in *Dip Narain Singh v. Hura Singh* (1). I am not aware of any ruling in which a different view was adopted, and, as I have already said, none was cited to us at the hearing. All the cases bearing on the point which I have been able to find in the reports are cases in which the purchaser had fully discharged the prior mortgage. I am unable to hold that upon considerations either of law or of equity the conclusion at which the Court below has arrived as to the apportionment of the mortgage money is erroneous. I would therefore dismiss the appeal with cost.

(1) (1897) I. L. R., 19 ALL., 527 at p. 534.

The objections preferred under section 561 of the Code of Civil Procedure by the plaintiff and by Prasadi Lal are, in my judgment, untenable. As the plaintiff in his claim distinctly asked for possession, to which, it is admitted, he was not entitled, the learned Judge was justified in refusing to allow him his costs of the suit.

I think the award of interest on the purchase money paid by Bansidhar which has been decreed to the appellants was under the circumstances of the case, equitable. I would therefore also dismiss the objections under section 561 with costs.

I would extend the time for payment to the 15th of January, 1901.

AIKMAN, J.—The facts which gave rise to the suit out of which this appeal has arisen are somewhat complicated. On the 19th of April, 1878, the owners of certain property situated in the village of Burka, in the Aligarh district, mortgaged it to Kaim Ali Khan and two others, described in the plaint as defendants, first party, as security for a loan of Rs. 1,500. On 29th January, 1886, one-fourth of the same property was mortgaged to one Gobind Ram as security for a loan of Rs. 325.

On 1st August, 1889, the first mortgagees got a decree for sale on their mortgage in a suit to which they had not made Gobind Ram a party.

On 23rd February, 1892, Gobind Ram in a suit in which he impleaded Ganga Ram and Dugar Singh, in whose favour mortgages of portions of the property had been executed subsequent to his mortgage, obtained a decree for sale under his mortgage of the 29th January, 1886.

The decree obtained by the defendants, first party, was attached by one Bansidhar, defendant, second party, in execution of a simple money decree he held against them. The mortgage decree was put in execution, and on the 24th March, 1894, the mortgaged property was sold by auction and purchased by Bansidhar for the sum of Rs. 1,050.

Eight months afterwards Bansidhar sold the property for Rs. 4,400 to Jan Muhammad Khan and Musammat Wahid-un-nissa, defendants, third party, who forthwith executed a usufructuary mortgage of it in favour of Dugar Singh and others, defendants, fourth party.

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On 4th December, 1894, Gobind Ram, the second mortgagee, sold his decree to Gobardhan Das, the plaintiff in the present suit, for Rs. 840-6-9. The plaintiff alleges that Gobind Ram not having been made a party to the suit in which the decree on the first mortgage was obtained, did not lose his right to redeem that mortgage, which right has passed to him, the plaintiff.

The relief which the plaintiff asked for in this suit was a decree for possession of the property covered by the first mortgage on payment of Rs. 1,050, the amount fetched at the auction sale, or any sum the Court might adjudge to be proper. To this prayer the words "and by redemption of the mortgage" are added. The plaintiff also adds a prayer for any other relief which, under the circumstances of the case, he might be held entitled to.

The present suit was instituted on the 8th December, 1894, On the 17th December, 1894, the defendants, first party, sold to one Prasadi Lal any rights they had under their mortgage deed of 19th April, 1878, and decree of 1st August, 1889, and Prasadi Lal was made a defendant to the suit. On 8th February, 1894, he filed a written statement, alleging that the sum of Rs. 9,590-4-0 was due under the mortgage deed, and that plaintiff was not entitled to redeem the mortgaged property until he had paid him (Prasadi) that amount.

The lower appellate Court has made a decree in favour of the plaintiff, declaring that if he pays into Court the sum of Rs. 11,020 in discharge of the first mortgage, he shall be entitled to bring to sale the property covered by the first mortgage in order to realize both this sum of Rs. 11,020 and the amount due under the decree of 23rd February, 1892, which was passed in favour of plaintiff's predecessor in title, the second mortgagee. Out of the amount of Rs. 11,020 directed to be paid into Court in redemption of the first mortgage, the lower appellate Court has ordered that the representatives of the auction purchaser under the decree on the first mortgage shall receive only the amount paid at the auction sale with interest, and that the balance shall go to Prasadi, the assignee of the rights of the first mortgagees. The representatives in title of the auction purchaser come here in second appeal.

The main plea urged in this appeal is that the apportionment of the Rs. 11,020 made by the lower appellate Court is wrong.

It is contended that the assignee of the first mortgagees is not entitled to any part of this amount, the whole of which, it is urged, should go to the representatives in title of the auction purchaser. The question as to who is entitled to the money to be paid in redemption of the first mortgage was the subject of long and able argument at the bar.

The learned District Judge refers in support of his decision to a passage in a judgment of this Court in case of *Dip Narain Singh v. Hira Singh* (1). The passage relied upon by the District Judge is as follows:—"If the purchase money paid by such a purchaser (*i.e.*, a third party buying at a sale in execution of a decree on a prior mortgage) did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole of the amount of the prior mortgage. The subsequent mortgagee would, in our opinion, have to pay the full amount due upon the prior mortgage, but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of mortgage money is due." Now it must be admitted that the above passage fully supports the order which the District Judge has made as to the apportionment of the money to be paid in redemption of the first mortgage. But a reference to the rest of the judgment will show that the opinion expressed in the passage cited was not necessary for the decision of the case before the Court, and must therefore be looked upon as *obiter dictum*. I was a party to the judgment in *Dip Narain Singh v. Hira Singh* (1). The able argument of the learned counsel for the appellants has satisfied me that the opinion expressed in the passage cited as to how the money should be apportioned is erroneous.

In order to explain the reasons for the view I now take, I will state the present case as follows, disregarding the various devolutions of interest which have taken place, as they only complicate matters and do not affect the decision of the question at issue.

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There are on a certain property two mortgages. The holder of the prior mortgage demands redress on his mortgage in a suit to which he does not make the second mortgagee a party. This decree is put into execution, the property is sold and purchased by a third party. The puisne mortgagee not having been made a party to the suit on the first mortgage, has not lost his right under his mortgage. He is entitled to bring the property to sale in order to realize the amount due on his mortgage. But, as held by this Court, he cannot bring the property to sale until he has redeemed the first mortgage. It has been decided in the case cited above and in other cases that what the puisne mortgagee has to pay is not the amount which the property fetched at auction, but the amount which he would have had to pay had he been made a party to the suit brought by the first mortgagee, that is, the full amount of the mortgage money due on the first mortgage. The question is—Who is to get this amount? It appears to me that the first mortgagee can have no claim whatever to it, and for the following reasons. When the property was sold in execution of a decree passed on the first mortgage, the purchaser got a complete title to the property so far as the first mortgagee and the mortgagor were concerned. The rights of the mortgagor in the property entirely passed away with the sale, and, whatever rights the first mortgagee may have to proceed against the other property of the mortgagor, he has no right to get anything more out of the mortgaged property when once it has been sold in execution of the decree upon his mortgage. The only defect in the purchaser's title to the property is that the property is still liable for the amount of the second mortgage, owing to the second mortgagee not having been made a party to the suit on the first mortgage. When the second mortgagee pays the amount due under the first mortgage, that is only a condition precedent to his getting payment of his money by having the property sold if necessary. Supposing the amount due under the first mortgage is Rs. 10,000, and the amount due under the second mortgage Rs. 800. When the second mortgagee pays in Rs. 10,000 he is entitled to have the property sold, and out of the proceeds he gets Rs. 10,000 plus Rs. 800, the amount of his own debt. It is clear, therefore, that all that he has got is Rs. 800, the amount of his own debt. If he

is paid the amount of his own debt, he has no right to proceed against the mortgaged property. As said above, his redemption of the first mortgage is only a step towards getting in his own money. It is a remarkable fact that in this case the representatives of the auction purchaser in their written statement distinctly said that they were willing to pay any amount found due to the second mortgagee, but no notice whatever is taken by the Courts below of this offer, and the fact that the Courts did not take notice of it is not made a ground of appeal in this Court.

Now, supposing the second mortgagee pays in the amount due under the first mortgage, from what source will this amount ultimately come? It is clear that it will come out of the property, for unless the property is of sufficient value to satisfy both the first and the second mortgagee, the second mortgagee will not, in order to recover a comparatively small sum, as in this case, risk the loss of a very large amount. Now, if the amount paid in by the second mortgagee on account of the first mortgage comes out of the property, what right has the first mortgagee to receive any portion of it? As said above, when the property was sold in execution of the decree on the first mortgage, the right of the first mortgagee to receive anything more *out of the property* came to an end. I have no hesitation in holding that the first mortgagee is not entitled to receive any part of the sum paid in by the second mortgagee in order to obtain the privilege of bringing to sale in satisfaction of his own debt a property in which the first mortgagee has ceased to have any interest, and which belongs solely to the auction purchaser, subject only to the liability to satisfy the second mortgage.

In the course of the argument stress was laid on the fact that the auction purchaser bought the property, when sold in execution of the decree on the first mortgage, for a very low price. I do not think this ought to affect the question we have to decide. He bought at a public auction—no fraud is attributed to him, and if he got a valuable property at a small price, that was his good fortune. For aught we know, Prasadi, who purchased the decree-holder's rights during the pendency of this suit, may have

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paid a still smaller price, but what the price was we are unable to say, as the copy of the sale-deed filed by him has somehow disappeared from the record.

It was also urged in argument that payment of the whole amount to the auction purchaser would affect the first mortgagee's rights under section 90 of Act No. IV of 1882. In my judgment the first mortgagee's rights under section 90 would not be affected. But whether or not, he is not, in my opinion, entitled to get any further sum out of the mortgaged property than was realized when it was sold in execution of the decree on his mortgage.

For the respondent, Prasadi, reliance was placed on a decision of this Court in the case of *Baldeo Bharthi v. Hushiar Singh*, (1). The facts of that case differ from those of the present, for, as is observed in the judgment, the first decree was not a decree for sale.

In this case the plaintiff as assignee of a second mortgagee, who had lent a sum of Rs. 325 on the security of one-fourth of the property mortgaged in the first deed of mortgage, prayed to be put in possession of the whole of the mortgaged property on payment of the amount realized at the auction sale. The second mortgage was a simple mortgage, and the above relief was one to which it is clear the plaintiff was not entitled. But he also asked for any other relief to which, under the circumstances of the case, he might be found to be entitled. With reference to this prayer I am of opinion that the Court below was justified in passing a decree for sale on redemption of the first mortgage. But, as set forth above, I differ from the lower appellate Court as to the manner in which the money to be paid by the plaintiff before he can sell the property in satisfaction, should be disposed of. I would sustain the 6th and 7th grounds of the memorandum of appeal to this Court, and hold that the money ought to go to the representatives of the auction purchaser, inasmuch as Prasadi by his sale-deed only acquired such rights as the first mortgagees may have to proceed under section 90 of the Transfer of Property Act, and did not acquire any right to money which would come out of the mortgaged property, seeing that any rights

(1) Weekly Notes, 1895, p. 45.

which his assignors had over that property disappeared when it was sold in execution of their decree.

I would modify the decree of the lower Court by directing that the whole of the money to be paid by the plaintiff for redemption of the first mortgage shall go to the appellants, the representatives of the auction purchaser, and I would allow them the costs of their appeal.

There is an objection filed by the plaintiff-respondent to the order of the lower Court in regard to costs. I would not interfere with that order, which was within the discretion of the lower Court, and would dismiss the objection with costs.

BY THE COURT—

Under the second paragraph of section 575 of the Code of Civil Procedure, the decree of the Court below is affirmed, and the appeal and the objection, under section 561 are dismissed with costs. The time for payment of the mortgage-money is extended to the 15th of January, 1901.

Appeal dismissed.

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20 of the Indian Divorce Act, No. 1V of 1869, does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. *A. v. B.* dissented from.

Assuming the proviso in section 17 to be applicable to a decree of nullity, a decree by the High Court confirming the same before the six months' period has expired, cannot on that ground be treated as made by a Court not competent to make it, within the meaning of sections 11 and 44 of the Indian Evidence Act 1872, and is therefore, under section 41, conclusive proof that the marriage was null and void.

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tion as to ancient documents—Destruction of original—Presumption applied to certified copy—Regulation No. LII of 1803, section 37—Disqualified proprietor—Procedure preliminary to taking estate under the Court of Wards—Procedure prescribed by the regulation to be strictly followed.] Held that the presumption allowed by section 90 of the Indian Evidence Act, 1872, may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available. *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno* followed.

The procedure prescribed by Regulation No. LII of 1803 for disqualifying proprietors and taking their estates under the Court of Wards must be strictly followed in order that the disabilities incident to the status of a disqualified proprietor may ensue. *Mohammad Zahoor Ali Khan v. Mussumat Thakoorani Rulla Koer* referred to. It is incumbent therefore upon one seeking to dispute an adoption on the ground that the person making it was a "disqualified proprietor" to show that all the procedure necessary to make such person a disqualified proprietor was carried out according to law.

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SECTION 92—Evidence admitted to contradict a recital of receipt of consideration in a deed of sale—Oral agreement.] The Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money, and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid, notwithstanding anything in section 92 of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.

Where the consideration money had been acknowledged to have been paid by a recital in the sale deed to that effect, Held that it was no infringement of the above section for a Court to accept proof that, by a collateral arrangement between vendor and purcha-

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ser, the consideration money remained with purchaser, in his hands for the purposes and under the conditions agreed upon between them.

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ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 92, *See* Mortgage.

IX (INDIAN CONTRACT ACT) SECTIONS 15, 16, 19 *Contract—Undue influence—Coercion—Civil Procedure Code, sections 522, 526—Award—Validity of award—Award purporting to be a considered award of the arbitrators, but really an agreement between the parties to the submission*] Under section 16 of the Indian Contract Act, 1872, as it stood before amended by Act No. VI of 1899, it is not sufficient, in order to render a contract voidable on account of undue influence, that the party claiming to avoid the contract should have been at the time he entered into it in a state of fear amounting to mental distress which enfeebled the mind: but there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the contract. *Jones v. Merionethshire Building Society* referred to.

Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witnesses was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was held that this would not prevent the award being a valid and binding award between the parties.

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SECTION 23—*Agreement opposed to public policy—Contract relating to purchase of land within his circle by a patwari—Act No. XIX of 1873 (N.W.P. Land Revenue Act) section 257.*] Held that a contract entered into by a patwari for the purchase for his benefit of land situated within his circle is a contract which is opposed to public policy, even though it may not be rendered void by the rules framed by the Board of Revenue for the guidance of patwaris.

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SECTION 23, *See* Act No. XII of 1881, section 7.

SECTION 30—*Loan to facilitate gambling—Loan to aid in paying off gambling debt—Contract not tainted with immorality.*] Held, that the fact that the object with which the plaintiff lent money to the defendant was to enable him to pay off a gambling debt, did not taint the transaction with immorality so as to disentitle the plaintiff to recover.

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SECTION 43—*Joint contract—Right of promisee to sue any or all of the joint promisors—Right of joint promisors to be joined as defendants—Decree against some only of several joint promisors—Effects of such decree—Civil Procedure Code, section 29—Hindu law—Joint Hindu family—Position of managing member.*] The effect of section 43 of the Indian Contract Act, 1872, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in the cases of *King v. Hore* and *Kendall v. Hamilton* is no longer applicable to cases arising in India, at all events in the Mufassil, since the passing of that Act, and a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract

against the other joint contractors. *King v. Hoare, Kendall v. Hamilton, In re Hodgson, Howard v. Schofield, Nulson Lall Chowdhry v. Shoukri Lall, Menendra Gomer Mullick v. Rajendrolall Moonshee, Gurusami Chetti v. Samurti Chinna Monnar Chetti, Lokmidas Kaimji v. Peshkara Hordas, Ratnu bhoy Habibkhan v. Turner, Chockalingam Madali v. Subharaya Madali, Narayana Carita v. Lakshmana Chetti, Sitadath Koer v. Land Mortgage Bank of India, Nrieh C. and Co. Roy v. Moguntari Dassya, Roy Lutchnipri Singh Bahadur v. The Land Mortgage Bank of India, Radha Pershad Singh Bahadur v. Ramkhalawan Singh, Bhukanadas Vijaykand. s. v. Lallabhai Kashidas, Laksmishankar Dershanakar v. Vishwaram, Dharam Singh v. Angar Lal, Motilal Bechordass v. Ghellobhai Hariram, Brinsmead v. Harrison, Wilson, Sims & Co. v. Bulwer's Brook Steamship Co., Robinson v. Grisel, Bulnankand v. Sangri, Priestley v. Fernie, Bir Bhaddar Sewak Pande v. Sarju Prasad, Bhawanee Pershad v. Kallu, Dhunpat Singh v. Sham Sunder Mitter referred to.*

The managing member of a Hindu joint family holds a position in relation to the other members of the family and the family property peculiar to himself and not precisely analogous to anything known to English law. He is not the agent of the other members of the family.

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ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 135, 137—*Principal and surety—Agreement to give time to principal debtor—Gratuitous agreement—Surety not discharged.* A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect an agreement to give time to the principal debtor must amount to a contract, that is, there must be consideration therefor. *Philpot v. Briant, Tucker v. Laing, and Clarke v. Birley*, referred to.

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See Act No. IX of 1890, sections 72, 76. SECTIONS 151, 152, 161.

SECTIONS 148, 151, 152—*Contract—Bailment—Liability of bailee—Liability of guest at hotel in respect of furniture used by him.* The defendant's wife went to stay at a hotel owned by the plaintiffs. While there she was seized with cholera and died. In consequence of the infectious nature of the disease, the plaintiffs were obliged to destroy the furniture which was in the rooms of the defendant's wife, and used by her during her illness. The plaintiffs subsequently sued to recover the value of such furniture from the defendant. *Held* that in the absence of evidence to show that the deceased had not taken as much care of the furniture as a person of ordinary prudence would, under similar circumstances, take of his own goods, the defendant was not liable, having regard to sections 121 and 152 of the Indian Contract Act, 1872. *Shields v. Wilkinson*, referred to.

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—1873—VIII (NORTHERN INDIA CANAL AND DRAINAGE ACT), SECTION 45. See Act No. XIX of 1873, section 241(i).

—1873—XIX (N.-W. P. LAND REVENUE ACT), SECTIONS 107 ET SEQQ.—*Partition—Revenue Courts not competent to partition buildings.* In a partition under the North-Western Provinces Land Revenue Act, 1873, neither buildings, nor the materials thereof can be partitioned; what is partitioned is the land in the mahal. Where such land is covered with buildings, the Court making the

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partition has to follow the provisions of section 124 of the Act; but it can decide no question of right to the buildings, nor can it partition them.

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ACTS—1873—XIX (N.-W. P. LAND REVENUE ACT), SECTIONS 166, 176, 168—*Act No. XII of 1881 (Agriculturists' Loans Act), section 5—Takavi loan—Sale of house in default of payment of loan—Effect of such sale.* The provisions of sections 166, 167 and 168 of the North-Western Provinces Land Revenue Act, 1873, apply only to the sale of a patti or mihal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was held that such sale did not avoid the prior incumbrance.

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Pre-emption. SECTION 191, See

SECTION 205 B—*Court of Wards—Contract entered into by disqualified proprietor whilst his property was under the charge of the Court of Wards.* Section 205 of Act No. XIX of 1873 does not cease to have effect when property to which it might apply is released from the custody of the Court of Wards. Such property cannot at any time be taken in execution of a decree obtained on a contract entered into by a ward of the Court at a time when his property was under the superintendence of the Court.

Himanchal Singh v. Jhama Lal ... 364

SECTION 241(i)—*Act No VIII of 1873 (Northern India Canal and Drainage Act), section 45—Civil and Revenue Courts—Jurisdiction—Suit to recover alleged excess payments in respect of irrigation dues.* Held that no suit would lie in a Civil Court to recover payments alleged to have been made in respect of irrigation dues in excess of what was properly leviable on the plaintiff.

Balwant Singh v. The Secretary of State for India in Council... 139

Act No IX of 1872, section 23. SECTION 257. See

—1874—XIV (SCHEDULED DISTRICTS ACT) SECTION 6—*Rule 17 of the Kumaun Rules, 1894—Code of Civil Procedure, sections 562, 564—Right of appeal against order under section 562—Order of remand where decision of first Court was not confined to preliminary point.* Where the Deputy Commissioner of Naini Tal decided that a suit was barred by limitation, but at the same time also came to a definite decision on each of the other issues, and the Commissioner in appeal, setting aside the finding as to limitation, remanded the case under section 562 of the Code of Civil Procedure.

Held, that under Government Notification No. 628 VII-669B, dated 27th June 1894, Rule 17, an appeal lies from such an order of remand. *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi* referred to.

Held, further that the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point, it was not, under sections 562, 564, of the Code of Civil Procedure, open to the Commissioner to make an order under section 562.

Hafiz Abdul Rahim Khan v. Raja Hari Raj Singh ...

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 21. *See* Partnership.

—1877—XV (INDIAN LIMITATION ACT), SECTION 7; SCHEDULE II, ARTICLE 120—*Hindu law - Reversioners—Suit to set aside alienation by Hindu widow—Similar suit barred by limitation as against a prior reversioner—Suit by subsequent reversioner not thereby barred*]. Held that, where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one such reversioner can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being to contest an alienation or an adoption by the Hindu widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioners. *Beni Prasad v. Hardai Bibi, Ramphal Rai v. Tula Kuari, Jumoona Dassya Chowdhurani v. Bamasoondarai Dassya Chowdhurani and Isri Dut Koer v. Mussumat Hansvitti Koerain* referred to. *Chhaganram Astikram v. Bai Motigavri and Pershad Singh v. Chedee Lal* dissented from.

A minor plaintiff instituting a suit which falls within Article 120 of the second schedule of the Indian Limitation Act, 1877, is not excluded from the benefit of section 7 merely because the right of some other person through whom he does not claim to sue for similar relief has become time-barred. The "right to sue" mentioned in the third column of Article 120 means the right to sue of the plaintiff or of some one through whom he claims. The "period of limitation" mentioned in section 7 means the period of limitation for the suit which the plaintiff or some one through whom he claims is entitled to institute. *Siddhassur Dutt v. Sham Chand Nundun, Mirno Moyee Debia v. Bhobhu Moyee Debia, Gobind Coomar Chowdhry v. Huro Chunder Chowdhry and Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar* referred to.

Bhagwanta v. Sukhi

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Execution of decree.

SECTIONS 7 AND 8. *See*

SECTION 14—*Limitation—“other cause of a like nature” to defect of jurisdiction—Error in procedure*]. In cases in which section 14 of the Indian Limitation Act, 1877, is pleaded as protecting the plaintiff from the bar of limitation, if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within the meaning of section 14. It is not necessary that the cause which prevented the former Court from entertaining the suit should be a cause which was independent of and beyond the control of the plaintiff.

Hence where the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and cause of action, and there was on the plaintiff's part in the former suit no want of good faith or due diligence, the plaintiff was held entitled to the benefit of the time during which he was prosecuting the former suit, that is, from the time when the plaint in that suit was filed until the time when it was returned to the plaintiffs for amendment. *Chunder Madhub Chuckerbutty v. Ram Coomar Chowdhry, Brij Mohan Das v. Mannu Bibi, Deo Prasad Singh v. Pertab Kairee, Bishambhar*

Haldar v. Bonomali Haldar, Ram Subhag Das v. Gobind Prasad, Jema v. Ahmad Ali Khan, Mullick Kefait Hossein v. Sheo Pershad Singh, Bai Janna v. Bai Tebha, Narasimma v. Muttayan, Tirtha Sami v. Seshapiri Pai, Subbarau Nayudu v. Yagana Pantulu, Venkitti Nayak v. Murugappa Chetty and Assan v. Pathumma, referred to.

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ACTS—1877—XV (INDIAN LIMITATION ACT) SCHEDULE II, ARTICLE 120 *Suit by auction purchaser of mortgaged property to cancel a perpetual lease granted by the mortgagor in contravention of a covenant in the mortgage.* During the continuance of a mortgage which contained a covenant against alienation of the mortgaged property, the mortgagor made a perpetual lease of that property. The mortgagee brought a suit on his mortgage, and having obtained a decree, put the mortgaged property up to sale. The auction purchaser of the mortgaged property on becoming aware of the existence of the perpetual lease, sued for its cancellation and for a declaration that the defendant had no right to interfere with or obstruct the plaintiff in respect of the property in question. *Held*, that the limitation applicable to such suit was that prescribed by article 120 of the second schedule to the Indian Limitation Act, 1877, and not that prescribed by article 91 or article 93. The main prayer of the plaint was for a decree declaring and establishing the plaintiffs' title and the prayer for cancellation of the lease could be treated as merely subsidiary to the main relief asked. *Pachamuthu v. Chinnappan and Uma Shankar v. Kalka Prasad* referred to. *Din Dial v. Har Narain* followed.

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— SCH. II., ART. 178. *See* Civil Procedure Code, section 244.

— SCH. II., ART. 179 (4) *See* Civil Procedure Code, section 294.

— SCH. II., ART. 179 (4). *See* execution of decree—Limitation.

—1878—XI (INDIAN ARMS ACT), SECTION 19(f)—*Notification No. 458 of the 18th March, 1898—Exemptions from the operation of the Arms Act—Volunteers.* A volunteer, being a person exempted in virtue of Notification No. 458, dated 18th March, 1898, of the Government of India, is not exempted merely with reference to his duties as a volunteer, but generally (subject to the exceptions mentioned in the said Notification). It is therefore not unlawful for a volunteer to possess fire-arms and to use the same.

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SECTIONS 19 27—*Exemptions from provisions of Arms Act—Government Notification No. 518 of the 6th March 1879—Government Notification No. 458 of the 18th March 1898—“Personal use” of Arms Arms carried and used by servant of exempted person.* By a notification under section 27 of the Arms Act (Act No. XI of 1879) issued by the Government of India, certain persons, amongst them Rajas and Members of the Legislative Council of the Lieutenant-Governor of the N.-W. P., were exempted from the operation of sections 13 and 16 of the said Act; but with this proviso, that, “except where otherwise expressly stated, the arms or ammunition carried or possessed by such persons shall be for their own personal use, &c., &c.” *Held* that the terms of this proviso would allow of a person exempted under the notification above alluded to sending a servant armed with a gun into a neighbouring district to shoot birds for him, and that a gun so carried and used by the servant of the exempted person was in the

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"personal use" of the exempted person within the meaning of the notification.	
Queen-Empress v. Ganga Din	118
ACTS—1870—I (INDIAN STAMP ACT), SEC. 1, ART. 8— <i>Stamp—Articles of association—Special resolution—Resolution superseding articles of association—Act No. VI of 1882 (Indian Companies Act), sections 70, 71</i> .] A company limited by shares and already possessing articles of association proceeded to pass a special resolution, in virtue of which a document was drawn up entitled "articles of association" in supersession of the articles theretofore in force. The record of this special resolution was under the provisions of section 79 of the Indian Companies Act, 1882, sent to the Registrar of Joint Stock Companies, to be recorded by him. The document was impounded by the Registrar on the ground that it required to be stamped as articles of association, and was not so stamped. Hereafter a reference was made by the Board of Revenue to the High Court under the provisions of section 46 of the Indian Stamp Act, 1870, as to whether the document in question required to be stamped. <i>Held</i> that the Indian Companies Act did not contemplate any such thing as new articles of association, and that the document in question was nothing more than the record of a special resolution, and as such did not require to be stamped.	
In the matter of the New Egerton Woollen Mills	131
—1881—V (PROBATE AND ADMINISTRATION ACT), SECTION 3— <i>Probate—Will—Document intended to take effect partly in the lifetime of the executant and partly after the executant's death.</i>] There is no objection to one part of an instrument operating in <i>præsentis</i> as a deed and another in <i>futuro</i> as a will. <i>Cross v. Cross</i> referred to.	
Chand Mal v. Lachhmi Narain	162
XII (N. W. P. RENT ACT) SECTION 7— <i>Expropriatory tenant—Expropriatory rights arising on sale of part only of vendor's proprietary rights.</i>] <i>Held</i> that in order that the provisions of section 7 of the North-Western Provinces Rent Act, 1881, may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. <i>Bhawan Prasad v. Ghulam Muhammad</i> approved.	
<i>Held</i> also that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory possession of the sir land, and agrees to relinquish his expropriatory rights in respect of the sir land, the vendee, in the event of such possession not being delivered on expropriatory rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. <i>Bhikham Singh v. Har Prasad</i> approved.	
Murlihar v. Pem Raj	205
SECTION 36— <i>Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.</i>] <i>Held</i> , that the mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is, as a trespasser.	
Zubeda Bibi v. Sheo Charan	83

ACTS—1881—XII (N.-W. P. RENT ACT) SECTIONS 36, 36(b)—*Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser Estoppel—Civil and Revenue Courts—Jurisdiction.*] Held that the fact that a plaintiff in a civil suit for ejectment of an alleged trespasser has on a previous occasion taken proceedings against the defendant under section 36 of the Rent Act, 1881, is not of necessity fatal to the suit in the Civil Court. *Baldeo Singh v. Imdad Ali and Deo Narain Rai v. Sheo Charan Rai* distinguished. *Zubeda Bibi v. Sheo Charan* followed.

Hamid Ali Shah v. Wilayat Ali ... 93

SECTIONS 93, 94—*Suit for recorded share of profits Suit for settlement of accounts—Limitation.*] Where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the landlord or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts incidentally to that main object, and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of section 93 (b) of the N.-W. P. Rent Act, 1881. *Rohan v. Jwala Prasad*, explained. *Indo v. Indo*, referred to.

Malik Muhammad Karim and others v. Ganga Pande ... 384

SECTIONS 170, 171, 172. See Civil Procedure Code, sections 245, 295, 4A.

—1882—II (INDIAN TRUSTS ACT) SECTIONS 82, 83. See Civil Procedure Code, sections 204, 317.

—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 39. See Hindu Law (2).

SECTION 60, See Mortgage (2)

SECTION 82. See Mortgage (1).

SECTION 85. See Mortgage (3).

SECTION 85—*Mortgage—Prior and subsequent mortgagees—Effect of non-compliance with section 85.*] A prior mortgagee, without making a puisne mortgagee a party to his suit, sued on his mortgage, obtained a decree for sale, sold the mortgaged property, and purchased it himself. Subsequently the puisne mortgagee holding a mortgage over the same property brought his mortgage into suit without making the prior mortgagee a party, and obtained a decree for sale. Held that the puisne mortgagee could not bring the mortgaged property to sale in execution of such decree. *Janti Prasad v. Kishen Das* followed.

Mehrbano v. Nadir Ali ... 212

SECTIONS 88, 89. See Civil Procedure Code, sections 13, 244.

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 90—*Execution of decree—Decree for sale on a mortgage—Mortgaged property sold in execution of a decree held by a different mortgagee—Section 90 not applicable.*] In order to make the remedy provided by section 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under section 90. Section 90 does not apply where the mortgaged property has been sold under a decree held by some other person. *Muhammad Akbar v. Munshi Ram*, Weekly Notes, 1899, p. 208, followed.

Badri Das v. Inayat Khan

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VI (INDIAN COMPANIES ACT) SECTIONS 29, 58, 92—*Application to compel registration of transfers of shares—Discretionary power of Directors to refuse registration—Articles of Association—Interference of the Courts.*] Where the Directors of a Company (the Muir Mills) refused to register the transfer of shares and relied on Article 21 of the Articles of Association, which empowered the Directors to “decline to register any transfer of shares to any person of whom they may for any reason disapprove.”—

(1) *Held*, that it is not necessary under section 58 for the applicants to join their vendors in their applications. *Ex parte Penney* distinguished; *Skinner v. City of London Marine Insurance Company*; *London Founders Association v. Clarke*; *Paine v. Hutchinson*; *Ex parte Gilbert* referred to. *Ex parte Shaw* followed.

(2) Where it was found that there was a defect in the constitution of the Board of Directors, which was not cured by the Articles of Association. *Held*, that the Court was not bound to dismiss the application under section 58 on the ground of its being premature, there having been no refusal to register by a properly constituted Board, but might treat the defence set up as a refusal, and deal with the application on the merits.

(3) Where it was found that the real objections entertained by the Directors to the various transferees were (1) their connection as employes of the Cawnpore Woollen Mills with McRobert (the Managing Director of the Cawnpore Woollen Mills) and the personal animosity existing between Johnson (the Managing Director of the Muir Mills) and McRobert, and (2) the desire of the Directors (of the Muir Mills) that McRobert should not add to his voting power at the meetings of the Company, and (3) that therefore the objections were not personal to the applicants themselves. *Held*, that where the Articles of Association give a discretionary power to the Directors to refuse to register a transfer, and it appears that the Directors have *bona fide* considered the matter, the Courts will not compel them to disclose their reasons, but if they do disclose their reasons, or evidence is produced as to their reasons, the Courts will consider whether those reasons proceeded on a right or wrong principle. *Held*, further, applying the principle of English cases, that objections not personal to the transferees do not constitute legitimate reasons. *Poole v. Middleton*; *In re Bell Bros.*; *Ex parte Penney*; *Moffat v. Farquhar*; *Kaikhosro v. Coorla Spinning and Weaving Co.*; *In re Coalport China Co.* referred to.

The Muir Mills Company, Limited, of Cawnpore v. T. H. Condon and A. Butterworth

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VI (INDIAN COMPANIES ACT,) SECTIONS 76, 79. See Act No. 1 of 1874, Schedule I, Article 8.

- ACTS - 1883 - XV (N.-W. P. AND OUDH MUNICIPALITIES ACT), SECTION 46—*Issue of distress warrant for recovery of alleged arrears of Municipal tax Jurisdiction of Magistrate.* Held that where a Magistrate, acting under section 46 of Act No. XV of 1883, issues a warrant for the realization of arrears of municipal taxes alleged to be due, the Magistrate is acting in a ministerial capacity only and has no jurisdiction to inquire as to whether such arrears are really due or not.
- Ellis v. The Municipal Board of Mussoorie . . . 111
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- SECTION 69—*Complaint of offence against Municipal bye-law—Power of Municipal Board to give a general authority to institute complaints on its behalf.* Held that section 69 of the N.-W. P. and Oudh Municipalities Act, 1883, confers upon Municipal Boards in the North-Western Provinces and Oudh the power to delegate generally their authority to make complaints in respect of municipal offences; and this general delegation includes not merely the giving of authority to do the formal act of presenting a complaint to a Court, but the exercise of discretion as to whether in any given case a complaint shall or shall not be made.
- Powell v. The Municipal Board of Mussoorie . . . 123
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- 1881 - XII (AGRICULTURISTS' LOANS ACT), SECTION 5. See Act No. XIX of 1873, sections 106, 107, 108.
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- 1890—VIII (GUARDIAN AND WARDS ACT), SECTION 11—*Guardian and Ward—Death of guardian—Suit by ward against guardian's son for rendition of accounts* Held that no suit would lie by a ward against the son of his late guardian for rendition of accounts. *Rameshwar Tiwari v. Kishun Kumar* referred to
- Manmothnath Bose Mullick v. Basinto Kumar Bose Mullick 332
-
- IX (INDIAN RAILWAYS ACT), SECTIONS 72, 76—*Act No. IX of 1872 (Indian Contract Act), sections 151, 152, 161—Contract—Bailment—Liability of bailee—Burden of proof—Railway Company.* Where goods are delivered to a railway company for carriage not "at owner's risk," and such goods are lost or destroyed while in the custody of the company, it is not for the owner suing for compensation for such loss or destruction to prove negligence on the part of the company, but, when the owner has proved delivery to the company, it is for the company to prove that they have exercised the care required by the Indian Contract Act, 1872, of bailees for hire.
- Nanku Ram v. Indian Midland Railway Company . . . 361
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- 1896—XII (EXCISE ACT), SECTION 49—*License to sell spirits retail—Death of licensee before expiration of period of license—Right of his heir and partner in business to continue sale—Personal nature of license.* Held, that a license for the retail sale of liquor under the Excise Act, No. XII of 1896, granted in the name of one man, does not on his death before the expiration of the period of the license descend to his heir and partner in business so as to justify the said heir and partner in business in continuing to sell during the unexpired portion of the period named in the license.
- Where an order had been made for the sale of the liquor, part of which was, as above ruled, illegally sold by the accused: Held, that if the said liquor had by devolution or otherwise become the property of the accused, there was no reason why it should not be attached and sold.
- Madho Pershad, In the Matter of . . . 441

AGREEMENT, GRATUITOUS *See* Act No. IX of 1872, sections 135, 137.

ANCIENT DOCUMENTS, PRESUMPTION AS TO. *See* Act No. I of 1872, sections 65, 91.

APPEAL. *See* Civil Procedure Code, sections 372, 588.

———— *See* Civil Procedure Code, section 591.

———— Abatement of—, *See* Civil Procedure Code, section 231.

———— Parties to—, *See* Civil Procedure Code, sections 372, 582.

———— Presentation of. *See* Letters Patent, section 8.

ARBITRATION, *See* Partnership.

ARMS. *See* Act No. XI of 1878, section 19(f).

———— *See* Act No. XI of 1878, sections 19, 27.

ARTICLES OF ASSOCIATION, *See* Act No. I of 1879, Schedule I, Article 8.

ASSIGNMENT pending suit. *See* Civil Procedure Code, sections 372, 588.

AUCTION PURCHASER, suit by. *See* Civil Procedure Code, section 335.

———— title of. *See* Execution of decree (5).

AWARD, *See* Act No. IX of 1872, sections 15, 16, 19.

BAILMENT. *See* Act No. IX of 1890, sections 72, 76.

———— *See* Act No. IX of 1872, sections 118, 151, 152.

BURDEN OF PROOF—*Hindu law—Joint Hindu family—Suit for partition—Plea by defendants that some of the property in suit was their self-acquired property.*] In a suit for partition of property alleged to be the property of a joint Hindu family, of which the plaintiff was a member, the defendants, while admitting that some of the property scheduled in the plaint was joint property, pleaded that the bulk of the property in suit, of which they were in possession, was their own self-acquired property. *Held* that the burden of proof was on the defendants to show that such property was their self-acquisition. *Gajendar Singh v. Sardar Singh, Dharm Das Pandey v. Musummat Shama Soondri Dibiah and Gobind Chunder Mookerjee v. Doorgapersaud Baboo* referred to.

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———— *See* Act No. IX of 1890, sections 72, 76.

CERTIFIED COPY OF ANCIENT DOCUMENT. *See* Act No. I of 1872, sections 65, 90.

CIVIL AND REVENUE COURTS, JURISDICTION OF— *See* Act No. XII of 1881, section 36.

———— sections 36, 96(b).

———— *See* Act No. XIX of 1873, section 241(1).

———— *See* Civil Procedure Code, sections 285, 295, 4A.

CIVIL PROCEDURE CODE, SECTIONS 13, 244—*Transfer of Property Act (No. IV of 1882), sections 88, 89—Decree not in accordance with judgment—Interpretation of decree.*] Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage deed, and this fact was apparently overlooked by the defendant who defended the suit, and

where, while the judgment declared "that a decree be given against the hypothecated estate," in the decree the property affected was described as "the property specified in the plaint."

Held, that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither section 13 nor section 211 of the Code of Civil Procedure concluded the defendant from subsequently suing to recover the property wrongly included in the plaint.

Ram Chander v. Kondo 342

CIVIL PROCEDURE CODE, SECTIONS 13, 511—*Res judicata*—*Under what circumstances a decision may be res judicata as between defendants.*] Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. *Ramchandra Narayan v. Narayan Mahadev*, I. L. R., 11 Bom. 216, *Ahmad Ali v. Najabat Khan*, I. L. R., 18 All. 65, and *Madhavi v. Kelu*, I. L. R., 15 Mad. 264, followed. *Rishnath Singh v. Bisheshwar Singh*, Weekly Notes, 1891, p. 31, referred to.

Section 511 of the Code of Civil Procedure does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants and to reverse the decree of the Court below in favour of all the defendants. *Puran Mal v. Krant Singh*, I. L. R., 20 All. 8, referred to.

Chajju v. Umio Singh 386

SECTION 20. See Act No. IX of 1872, section 43.

SECTION 30—*Numerous persons interested similarly in the result of a suit*—*Permission given to some to sue on behalf of all*—*Permission granted after the filing of the suit by some only.*] *Held*, that the permission required by section 30 of the Code of Civil Procedure may be granted after the filing of a suit by some only of the persons interested therein. *Fernandez v. Rodrigues* followed.

Baldeo Bharthi v. Bir Gir 269

SECTIONS 51, 578—*Plaint not signed by plaintiff or his authorized agent*—*Effect of such want of signature*—*Plaint not necessarily void*—*Breach of contract*—*Measure of damages.*] *Held*, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf as required by section 51 of the Code of Civil Procedure will not necessarily make the plaint absolutely void. A defect in the signature of the plaintiff, or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and having regard to section 578 of the Code of Civil Procedure, is not a ground for interference in appeal. *Rajit Ram v. Katesar Nath and Mohini Mohun*

Das v. Bungsi Buddan Saha Das referred to. *Maryhub Ahmad v. Nikal Ahmad* overruled. *Mahabir Prasad v. Shah Wahid Alam* distinguished. *Katesar Nath v. Aggyan* and *Badri Prasad v. Bhagwati Dhar* discussed.

The plaintiff sold to the defendant a certain number of cases of embroidered muslin. The defendant took delivery of some of the cases, but refused to take delivery of or pay for the rest. The plaintiffs re-sold the goods refused by the defendant, and brought a suit against the defendant for damages. *Held*, that the proper measure of damages was the difference between the contract price of the goods which the defendant had refused to accept, and the price realized by the plaintiff on the re-sale. *Moll Schutte & Co. v. Luckmi Chand* followed. *Fule & Co. v. Mahomed Hossain* dissented from.

Basdeo v. Smidt

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CIVIL PROCEDURE CODE, SECTIONS 102, 103, 157—*Order dismissing a suit for default of appearance—Construction of order—Application for restoration of suit—Pleadings—What constitutes an "Appearance".*] In construing an order alleged by one side and denied by the other to be an order under section 102 of the Code of Civil Procedure, the order will be considered as an order under section 102, if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear.

Where, his suit having been dismissed for default of appearance under section 102 of the Code, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear.

It is not an "appearance" within the meaning of section 102 of the Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply for an adjournment. *Shankar Dat Dube v. Radha Krishna* and *Soonderlal v. Goorprasad* approved. *Mahomed Azeem-ool-lah v. Ali Buksh, Kashi Parshad v. Debi Das* and *Kanahi Lal v. Naubat Rai* referred to.

Lalta Prasad v. Nand Kishore

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SECTION 211, *See* Execution of decree (1).

SECTION 230—*Execution of decree—Decrees for payment of money—Hypothecation decree—Construction of document.*] A decree was passed on the 5th March 1884, based on a compromise between the parties. The decree was for the payment of certain sums of money by instalments, and further went on to declare that "The property in the bond remains hypothecated as before. The defendants have no power to transfer it. If any other person brings to sale the hypothecated property in satisfaction of the debt due by the defendants, the plaintiff shall have power to take out execution of the decree without waiting for the instalments, and to cause the hypothecated property to be sold by auction." *Held*, that this was not a simple decree for the payment of money such as would come within the purview of section 230 of

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the Code of Civil Procedure *Janki Prasad v. Baldeo Narain*, I. L. R., 3 All., 216, distinguished. *Chundra Nath Dey v. Burroda Shoodury Ghose*, I. L. R., 22 Calc., 813, and *Lal Behary Singh v. Habibur Rahman*, I. L. R., 26 Calc., 166, referred to.

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CIVIL PROCEDURE CODE SECTION 231—*Execution of decree—Suit under section 231—Suit decreed—Appeal by decree-holders—Death of one of two joint decree-holders—Abatement of appeal.*] A suit was instituted against two joint decree-holders under section 283 of the Code of Civil Procedure for a declaration that certain property which had been attached by them belonged to the plaintiffs, and was not liable to be taken in execution of the decree. The suit was dismissed by the Court of first instance, but decreed by the lower appellate Court. The decree-holders appealed, but during the pendency of the appeal one of them died and no steps were taken to bring his representatives on the record within the prescribed period.

Held that the appeal abated *Ghamandi Lal v. Amir Begam* referred to.

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SECTION 234. *See* Execution of decree—Civil Procedure Code, section 234.

SECTION 244—*Execution of decree Questions for the Court executing the decree—Sale in execution—Suit by decree-holder and judgment-debtor against auction-purchaser to set aside sale alleging an uncertified adjustment of the decree prior to sale.*] *Held*, that the provisions of section 244 of the Code of Civil Procedure disallowing a separate suit to determine questions arising between the parties to the suit in which a decree has been passed and bearing upon the execution thereof, operates not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. *Basti Ram v. Fattu and Prosunno Kumar Sanjal v. Kali Das Sanjal* referred to.

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SECTION 244—*Execution of decree—Question “arising between the parties to the suit”—Sale of property by the Collector as ancestral property—Suit to set aside sale on the ground that property was not ancestral.*] Certain property of a judgment-debtor having been sold by the Collector under section 320 of the Code of Civil Procedure as being ancestral property, the judgment-debtor sued the decree-holder and the auction-purchaser to have the sale set aside upon the two main grounds that the property was not ancestral, and therefore could not legally be sold by the Collector, and that the real purchaser at the auction sale was the decree-holder himself who had not obtained the leave of the Court to bid. *Held* that the question thus raised were questions arising between the parties to the suit within the meaning of section 244 of the Code of Civil Procedure and that the suit would not lie. *Basti Ram v. Fattu and Prosunno Kumar Sanjal v. Kali Das Sanjal* referred to.

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SECTION 244—*Execution of decrees—Sale in execution—Decree satisfied—Amendment of decrees in favour of*

judgment-debtors—Application by judgment-debtors to recover surplus from decree-holders.] Where by a sale in execution the decree as it stood at the time when execution was taken out had been fully satisfied, but the decree was afterwards amended at the instance of the judgment-debtors, and in consequence of the amendment the decree-holders were found to have realized more from the judgment-debtors than they were entitled to, it was held that it was competent to the judgment-debtors by application under section 244 of the Code of Civil Procedure to recover such surplus from the decree-holders.

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CIVIL PROCEDURE CODE, SECTION 244—*Execution of decree—Suit brought under circumstances where the proper remedy was by application under section 244—Discretion of Court to treat the plaint as an application under section 244.]* Where certain judgment-debtors, whose property had been sold in execution of a decree, brought a suit to have the sale in execution set aside under circumstances in which their proper remedy in law, if any, was by means of an application under section 244 of the Code of Civil Procedure, it was held that it was not an improper exercise of the discretion of the Court in which such suit was brought to treat the plaint as an application under section 244 of the Code. *Biru Mahata v. Shyama Churn Khawas* followed. *Mayan Patihuti v. Pakuran* referred to.

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SECTION 244—*Parties to the suit or their representatives—Purchaser at auction sale.]* Where a decree-holder who had obtained a decree and order under sections 88, 89 of the Transfer of Property Act over certain property, proceeded to attach it in execution of his decree: *Held*, that a third party who had bought the rights and interests of the judgment-debtors at an auction sale held in consequence of a money decree was not a legal representative of the judgment-debtors so as to entitle him to be heard under section 244 of the Code of Civil Procedure at the execution proceedings. *Sahajit v. Sri Gopal* followed. *Provanoo Kumar Sanyal v. Kali Das Sanyal* distinguished.

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SECTION 244—*Plaint in a suit treated as an application under section 244—Act No. XV of 1877 (Limitation Act), Sec. II, Art. 178.]* Where a suit is filed under circumstances in which the proper remedy is an application under section 244 of the Code of Civil Procedure, and the Court in the exercise of its discretion treats the plaint in the suit as an application under section 244, the rule of limitation applicable will be that appropriate to applications under section 244, namely, that prescribed by Art. 178 of the second schedule to the Indian Limitation Act, 1877. *Jhannan Lal v. Kewal Ram* Weekly Notes, 1890, p. 219, and *Biru Mahata v. Shyama Churn Khawas*, I. L. R., 22 Cal., 483, referred to.

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SECTION 244—*Representative of a party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage.]* Held that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of section 244 of the Code of Civil Procedure. *Madho Das v. Ramji Patak*, referred to.

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CIVIL PROCEDURE CODE SECTIONS 285, 295, 4A—*Execution of decree—Procedure Act No. XII of 1881 (N.-W. P. Rent Act), sections 170, 171, 172—Civil and Revenue Courts.*] Held that the procedure prescribed by section 285 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court.

Hence where the same property had been attached both by a Court of Revenue and by a Civil Court, but was first brought to sale by the Court of Revenue, it was held that the purchaser at the sale held in execution of the decree of the Court of Revenue took a good title as against the purchaser at the sale held in execution of the decree of the Civil Court. *Onkar Singh v Bhup Singh, Aulia Bibi v Abu Jafar and Madho Prakash Singh v. Murla Manohar*, referred to

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SECTION 294—*Application by the decree-holder for leave to bid at a sale in execution of his decree—Limitation—Act No. XV of 1877 (Limitation Act), Sch. II, Art. 179(4)—Execution of decree.*] Held, that an application for leave to bid at a sale in execution under section 294 of the Code of Civil Procedure is an application to take some step in aid of the execution of the decree within the meaning of Art. 179(4) of the second schedule of the Indian Limitation Act, 1877. *Bansi v. Sikree Mal*, 1. L. R., 13 All., 211, followed *Raghunandan Misser v. Kalley Dut Misser*, 1. L. R., 23 Cal., 600, dissented from.

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SECTIONS 294, 317—*Indian Trusts Act (No. II of 1882), sections 82, 88—Purchase by alleged agent of decree-holder at sale in execution.*] Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance, the decree-holders sued for a declaration that they were the real purchasers and for possession of the property.

Held, that under such circumstances the second paragraph of section 317 of the Code of Civil Procedure did not exclude the application of the first paragraph of that section.

Held, further that sections 82, 88 of the Indian Trusts Act (No. II of 1882) did not apply.

Sankunni Nayar v. Narayan Nambudri and Kambalinga Pillai v Ariaputra Padiachi distinguished. *Monappa v. Surappa* referred to.

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SECTIONS 311, 312. See Execution of decree (6).

SECTION 320, See, *ib* section 244.

SECTION 335—*Execution of decree—Suit by unsuccessful auction-purchaser for a declaration of right and for possession—Court-fee—Act No. VII of 1870 (Court Fees Act), section 7.*] A purchaser of property at a sale held in execution of a decree obtained formal possession, but was resisted in obtaining actual possession by a person, who claimed to be the

owner in possession of the property. An application made by the auction-purchaser under section 335 of the Code of Civil Procedure was rejected, and the auction-purchaser accordingly filed a suit against the person in possession claiming a declaration of his right to the property, and to be put in actual possession thereof. *Held*, that such a suit was properly stamped with a Court-fee stamp of Rs. 10. *Dhondo Sakharam Kulkarni v. Gopal Babaji Kulkarni*, I. L. R., 9 Bom., 20, referred to.

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CIVIL PROCEDURE CODE, SECTIONS 308, 582, 591—*Abatement of Appeal—Order or decree—Order as to abatement of appeal embodied in the judgment and decree—Rules of the Court, Rule 9.*] Where one of four respondents (plaintiffs) in the lower appellate Court died, and no application was made within six months to put the legal representative on the record, and in the application that eventually was made the wrong person was named as legal representative: *Held*, the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died. Under the circumstances section 308 read with section 582 of the Code applied, and the proper order was to have directed the suit to abate: *Held*, further, that where the order of the lower Court as to abatement was embodied in the judgment and decree, objection was properly taken thereto by way of second appeal against the decree. *Sheo Nath Singh v. Ram Din Singh*; *Sher Singh v. Dilmun Singh*; *Dhari Upadhyay v. Ranshan Chaudhri*; *Sant Lal v. Sri Kishen*; *Chandarsang v. Khimabhai* referred to.

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SECTIONS 372, 582—*Appeal—Devolution of interest pending appeal—Array of parties in appeal*] By virtue of the first portion of section 582 of the Code of Civil Procedure, section 372 of the Code applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. In the matter of the petition of *Sarat Chandra Singh* followed. *Rajaram Bhagwat v. Jibai* and *Ramji Morarji v. J. E. Ellis* referred to. *The Collector of Muzaffarnagar v. Husaini Begum* distinguished.

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SECTIONS 372, 588—*Assignment pending suit—Application by assignees to be allowed to appeal against the decree—Order rejecting application—Appeal.*] A defendant, pending the suit, made an assignment of his interest therein. No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* to the detriment of the assignees. The assignees filed a memorandum of appeal claiming that they were entitled to file an appeal under the circumstances set forth in their memorandum. The Court, apparently treating this memorandum as an application under section 372 of the Code of Civil Procedure, dismissed it. *Held*, that an appeal would lie from this order of dismissal as from a decree. *Indo Mati v. Gaya Prasad*, I. L. R., 19 All., 142, followed.

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SECTION 493—*Temporary injunction—“Other injury.”*] *Held*, that the words “or other injury” in section 493 of the Code of Civil Procedure do not include acts of trespass upon property.

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CIVIL PROCEDURE CODE, SECTION 505—*Criminal Procedure Code, section 145—Order of Magistrate for maintenance of possession no bar to the appointment of a receiver by a Civil Court.*] The fact that there exists in respect of any immovable property an order of a Magistrate passed under section 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by section 505 of the Code of Civil Procedure of appointing a receiver in respect of the same property

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SECTIONS 522, 526, *See* Act No. IX of 1872, sections 15, 16, 19.

SECTIONS 502, 504. *See* Act No. XIV of 1874.

SECTION 591—*Appeal—Appeal from decree in suit, the grounds of appeal being solely directed against an interlocutory order in the suit.*] *Held*, that no appeal would lie where, the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an interlocutory order passed in the suit. *Sheo Nath Singh v. Ram Din Singh*, followed.

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COERCION, *See* Act No. IX of 1872, sections 15, 16, 19.

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See Criminal Procedure Code, section 203.

CONFESSION, *See* Criminal Procedure Code, section 288.

CONSTRUCTION OF DOCUMENT—*Grant of Land—Presumption as to boundaries where grant is described as bounded by a river or a road—Meaning of "river."*] If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption; and this, though the measurement of the property which is granted can be satisfied without including half the road or half the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road. And this rule of construction cannot be departed from merely because it is shown that it would have been to the interest of the grant or to retain half the bed of the river. This rule of construction applies equally whether the subject matter be a grant from the Crown or a subject. *Micklethwaite v. Newlay Bridge Co., Ecroyd v. Coulthard and Lord v. The Commissioner for the City of Sydney*, followed.

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CRIMINAL PROCEDURE CODE, SECTIONS 57, 58, 89—*Absconding offender—Proclamation and alias warrant—Sale of attached property—Title of purchaser.* Where property was attached and sold as property of a proclaimed offender under sections 57 and 58 of the Code of Criminal Procedure, it was held that although the proclamation was irregular, yet, the property having vested in third parties, strangers to the proceedings in which the proclamation was made, the sale could not be set aside.

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SECTIONS 133, 135—*Order of Magistrate for removal of unlawful obstruction—Application for appointment of a jury—Effect of verdict of jury.* Where a person against whom an order has been made under section 133 of the Code of Criminal Procedure applies for a jury under section 135 of the Code, the applicant is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bona fide* claim of right.

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1860, section 193.

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SECTION 203—*Procedure—Complaint—Dismissal of complaint—Subsequent complaint arising out of the same matter.* When a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it. *Niralan Sen v Jogesh Chundra Bhattacharjee and Komal Chandra Pal v Gourchand Audhkari* followed. *Queen-Empress v. Puran and Queen-Empress v. Umedan* referred to.

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SECTION 550—*Act No. I of 1881 (Police Act), section 29—Trial by District Magistrate for breach of orders of a Reserve Inspector of Police—Magistrate not "personally interested."* Held, that the Magistrate of a district was not, on account of his being the head of the police of the district, debarred by reason of section 550 of the Code of Criminal Procedure from trying a person accused under section 29 of the Police Act, 1861, of a breach of the orders of a Reserve Inspector of Police.

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SECTION 288—*Previous statement to committing Magistrate retracted in Sessions Court—Use of such statement by Sessions Court as substantive evidence—Act No. 1 of 1872 (Indian Evidence Act), section 30—Confession of co-accused—"Taking into consideration"—Finding of arms and stolen property in joint family house—Evidence—Act No. XLV of 1860 (Indian Penal Code), section 412.* Where a witness who has made a statement before the committing Magistrate subse-

quently resiles from that statement in the Court of Session, the statement made before the committing Magistrate can be used under section 285 of the Code of Criminal Procedure to contradict the witness; but the use of such statement as substantial evidence of the facts alleged by the witness on the prior occasion is fraught with the gravest peril, and could never have been the intention of the Legislature.

The words "take into consideration" in section 30 of the Indian Evidence Act, 1872, do not mean that the confession referred to in the section is to have the force of sworn evidence. *Queen-Empress v. Khandia* referred to

Held—The bare finding of stolen property and arms in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction.

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— for payment of money—hypothecation decree. *See* Civil Procedure Code, section 230.

— Interpretation of—*See* Civil Procedure Code, sections 13, 214.

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— "Personal" decree. *See* Hindu Law (5).

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— of 1873, section 200b

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— *See* Criminal Procedure Code, section 288.

— Exclusion of oral—by documentary *See* Mortgage (4)

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EXECUTION OF DECREE (1) *Civil Procedure Code, section 211—*

Mesne profits—Interest on mesne profits not given by decree—

Interest not obtainable in execution—Costs of collection of rents

by a trespasser in possession not to be set off against mesne pro-

fits.] A plaintiff sued for cancellation of a certain lease, and for

ejectment of the defendant as a trespasser, and for mesne profits

with interest on such mesne profits. The decree which he obtained

was a decree for cancellation of the lease and ejectment of the

defendant, and ordered that mesne profits should be ascertained in

the execution department, but was silent as to interest. Held that

interest on the mesne profits could not be obtained in execution

of the decree. Hurro Durga Chowdhry v Surut Sundari Devi,

and Krishna Nand v. Kunwar Partab Narain Singh, referred

to.

* *Held* also that as the defendant had thrust himself into an estate and not acted in the exercise of a *bonâ fide* claim of right, he was not entitled to charge collection expenses in reduction of the mesne profits. *McArthur and Co. v. Cornwall*, distinguished.

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EXECUTION OF DECREE (2) *Civil Procedure Code*, section 231—*Successive deaths of judgment-debtor and his legal representative—Execution against legal representative of the legal representative.*] The judgment-debtor under a simple money decree died before execution was taken out against him. Execution of the decree was sought against his legal representative, into whose hands it was found that certain of the assets of the deceased judgment-debtor had come; but before anything was recovered the legal representative, in turn, died. *Held*, that the decree-holder was entitled to execute his decree against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which might have come into her possession.

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(3) *Limitation—Act No. XV of 1877 (Indian Limitation Act)*, sections 7 and 8—*Minority.*] Section 8 of the Indian Limitation Act, 1877, applies only to those cases in which the act of the adult joint creditor is *per se* a valid discharge. *Seshan v. Rajagopala and Govindram v. Talia* followed. *Hargobind v. Srikishen* overruled.

A decree was passed in 1881 in favour of two decree-holders. Subsequently one of the decree-holders died, and the names of his widow and his two minor sons and one minor daughter were entered as his representatives. In 1888 an application was made for execution by the widow on behalf of the minor sons, which was dismissed. In February 1894 the two sons of the deceased decree-holder being still minors made another application for execution through one Aijaz Husain. *Held* that section 7 of the Limitation Act applied, and that this application was not time-barred. *Lalit Mohun v. Misser v. Janoky Nath Ray and Pahari v. Bhupendra Narain Roy* followed.

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(4) *Limitation—Act No. XV of 1877 (Indian Limitation Act)*, Sch. ii. Art. 179 (4)—*Application to take some step in aid of execution—Payment of process fee.*] The mere payment of process fee for the issue of notice for the purpose of an inquiry under section 287 of the Code of Civil Procedure, or the payment of costs for the issue of a proclamation of sale, unaccompanied by any application, will not operate to give a fresh starting point for limitation within the meaning of article 179(4) of the second schedule to the Indian Limitation Act, 1877. *Har Sahai v. Sham Lal and Dwarakanath Appaji v. Anandrao Ramchandra* followed. *Barmha Nand v. Sarbishwara Nand* distinguished. *Radha Prosad Singh v. Sundar Lal* dissented from.

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(5) *Sale in execution—Title of auction-purchaser—Purchaser not bound to enquire into the validity of the order under which the sale takes place.*] Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look

behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan v. Kazim Husain*, I. L. R., 13 All., 432, distinguished. *Rewa Mahlan v. Ram Kishan Singh*, I. L. R., 14 Calc., 18, and *Mukhoda Dass v. Gopal Chunder Dulla*, I. L. R., 26 Calc., 734, referred to.

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EXECUTION OF DECREE (6) *Sale in execution—Sale set aside—Second sale in execution of a different decree First sale subsequently confirmed in suit for that purpose Title of purchasers at first sale - Civil Procedure Code, sections 311, 312.* Certain immovable property was sold in execution of a decree, but on objections being raised by the judgment-debtors under section 311 of the Code of Civil Procedure the sale was set aside. After the sale had been thus set aside the same property was again sold in execution of another decree. Subsequently in a suit brought by the purchasers at the first sale (in which suit the judgment-debtors, who alone were made defendants, confessed judgment) the first sale was confirmed. The purchasers at the first sale then sued the purchasers at the second sale for possession of the property sold. *Held* by Strachey, C. J., that the second purchasers having acquired their title at a time when the first sale had been set aside, their title was not affected by the subsequent confirmation of the sale and was good as against the first purchasers. *Held* further (by Strachey, C. J., and Banerji, J.) on the finding that the decree confirming the first sale had been passed in a suit to which the purchasers at the second sale were no parties, and had, moreover, been obtained by means of collusion between the plaintiffs and the judgment-debtors, that such decree could not defeat the title acquired by the purchasers at the second sale.

Dagdu v. Panchamsing Gangaram, Konapa v. Janardan, Adhur Chunder Banerji v. Aghore Nath Aroo and Ram Chunder Sadhu Khan v. Sanvir Ghazi distinguished; *Nawab Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan*, referred to by Strachey, C. J.

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— See Act No. IV of 1882, section 90.
 — See Civil Procedure Code, section 230.
 — See Civil Procedure Code, section 231.
 — See Civil Procedure Code, section 244.
 — See Civil Procedure Code, sections 285, 295, 4A.
 —, section 294.
 —, section 335.
 — Purchase by alleged agent of decree-holder at sale in execution. See Civil Procedure Code, sections 294, 317.

FALSE EVIDENCE, See Act No. XLV of 1860, section 193

GUARDIAN AND WARD. See Act No. VIII of 1890, section 41.

HINDU LAW—(1) *Hindu widow—Reversioners entitled to succeed successively on death of Hindu widow—Suit by some of such reversioners to set aside alienations made by widow in possession—Res-judicata.* Where there are several reversioners successively entitled to succeed to property for the time being in the possession of a Hindu female, a decree in a suit by some of such reversioners seeking to set aside alienations made by the female in possession will not constitute *res judicata* in respect of a similar suit brought by other reversioners. *Bhagwanta v. Sukhi*, I. L. R., 23 All., 33,

Jumona Dassya Chowdhrañi v. Bamasonderai Dassya Chowdhrañi, L. R., 3 I. A., 72, and *Isri Dut Koer v. Mussamat Hansutti Koerain*, L. R., 10 I. A., 150, referred to.

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HINDU LAW (2) *Hindu widow—Right to maintenance—Sale of property in respect of which the widow's right to maintenance might be enforceable—Act No. IV of 1882 (Transfer of Property Act, section 39)* The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. *Sham Lal v. Banna and Lakshman Ramchandra Joshi v. Satyabhamabai*, referred to

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(3) *Joint Hindu family—Joint family property sold in execution of a decree on a mortgage against the father alone—Decree satisfied—Subsequent recovery by the sons of part of the mortgaged property—Remedy of mortgagee.* A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a further cash payment of Rs. 59, satisfied the mortgage debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree, and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage debt proportionate to the share in the joint family property owned by them. *Held*, that the original mortgage having become extinct the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhawani Prasad v. Kallu*, I. L. R., 17 All., 537, referred to. *Dharam Singh v. Angan Lal*, I. L. R., 21 All., 301, followed.

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(4) *Joint Hindu family—Maintenance—Right of illegitimate son to maintenance.* In the regenerate classes of Hindus a son of illegitimate birth has no part in the family inheritance, but is entitled to maintenance out of his father's estate;—a right personal to him and not inherited by his offspring. *Chhoturya Ram Murdun Syn v. Sahub Purhulad Syn* referred to and followed:—

An allowance for maintenance was received by the plaintiff's father, that father having been an illegitimate son born to a collateral relation of the head of a family. The ancestral property was in the possession of the latter, who was in a senior line of descent.

The plaintiff, who was himself the legitimate son of his father, claimed to be entitled to redeem a mortgage of part of the ancestral estate, that mortgage having been effected by the above-mentioned head of the family. His ground of claim was that he had inherited the right to maintenance, and had thus an interest or charge within the meaning of section 91 of the Transfer of Property Act, 1884, to entitle him to redeem.

The decision was that the High Court had rightly concluded that he had not inherited that right. The authority of the *Mitakshara* in Chap. I, sections 11 and 12, was more consistent with a personal right of the illegitimate son.

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— Joint Hindu family—Position of managing members.
See Act No. IX of 1872, section 43

HINDU LAW—(5) *Liability of member of joint family though not made a party to the suit*—“Personal” decree, meaning of.] Where a decree provided for the sale of specified property of a joint family and, in the event of the amount of the decree not being thereby satisfied, for the realization of the balance from the defendants personally: *Held*, that a junior member of the joint family, who was liable for his share of the debt sued on, but who was not made a party to the suit, could not successfully plead that the decree being a personal one in regard to the unsatisfied balance, he was not liable in regard to such unsatisfied balance. *Beni Madho v. Badesu Patak and Bhawan Prasad v. Kallu* referred to.

Hari Ram v. Bishnath Singh ... 408

— (6) *Mitakshara—Stridhan—What constitutes stridhan*—Property inherited from a female—Descent of Stridhan.] Amongst property which becomes *stridhan* according to the law of the *Mitakshara* is property inherited from a female.

It is not the case that where such *stridhan* has once devolved according to the law of succession which governs the descent of this peculiar species of property it ceases to be ranked as *stridhan* and is ever afterwards governed by the ordinary rules of inheritance. *Thakoor Begum v. Mut Bishu Ram, Baugwandeem Doobey v. Myna Bace, Chotay Lall v. Channo Lall, Dhukar Singh v. Rajet Singh and Multu Baugwandeem Taccar v. Dora Singha Taccar*, referred to.

Debi Suman v. Shoo Shankar Lal ... 353

— (7) *Mitakshara—Succession—Daughter's daughter.*] *Held*, that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grand-father.

Bansidhar v. Ganeshi ... 338

— See Act No. XV of 1877, section 7; schedule ii, Article 120.

— See Burden of proof.

INJUNCTION, See Civil Procedure Code, section 493.

JOINT FAMILY PROPERTY. Sale of, in execution. See Hindu Law (3).

JOINT HINDU FAMILY, See Burden of proof.

— See Hindu law (3), (4) and (5).

JURISDICTION, Civil and Revenue Courts— See Act No. XII of 1881, section 36.

— See Act No. XII of 1881, sections 36, 96 (b).

— See Act No. XIX of 1873, section 241(i).

JURY, See Criminal Procedure Code, sections 133, 135.

— Rules, 1894, Rule 17. See Act No. XIV of 1874.

LEGAL PRACTITIONER,—See Letters Patent, 1836, para. 8.

LEGAL REPRESENTATIVE *See* Execution of decree—Civil Procedure Code, section 234.

LETTERS PATENT, SECTION 8—*Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor.* Held, that the presentation of an appeal by a person who was not an advocate, vakil or attorney, of the Court, nor a suitor, is not a valid presentation in law, having regard to section 8 of the Letters Patent of the High Court.

Shiam Karan v. Raghunandan Prasad ...

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Removal of a vakil from the roll for reasonable cause—A conviction under section 411 of the Indian Penal Code. A vakil of the High Court was convicted, under section 471 of the Indian Penal Code, of fraudulently using as genuine a document which he knew to be forged. This was affirmed on appeal, when the punishment to which he had been sentenced was reduced to two years.

The High Court, while not allowing the propriety of the conviction and sentence to be questioned, and considered whether his culpability was such as to disqualify him for his profession, and had decided in the affirmative, removing him from the roll, under para. 8 of the Letters Patent, 1866.

Held, that, in the present case, the conviction, followed by the sentence, was sufficient, without further inquiry, to justify the High Court in making that order. The appellant could not be allowed to have an indirect appeal against the judgment of the Sessions Judge confirmed by the High Court. The judgment of Lord Mansfield in *ex parte Broussault* referred to as well explaining the disqualification of a member of the legal profession that attends such a conviction and sentence.

In *re Wear* where the Court of Appeal looked to see what was the nature of the offence, and would not, as a matter of course, strike a solicitor off the roll because he had been convicted, distinguished from the present case.

In *re Durga Charan* dealt with under section 12 of Act XVIII of 1870, referred to as a case where the nature of the offence admitted of further inquiry and also distinguished.

In regard to the finality of the judgment of the High Court in deciding the appeal from the conviction and sentence, *in re the petition of Alacra* was referred to.

In the matter of Rajendro Nath Mukerji ...

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LICENSE to sell spirits. *See* Acts—1896—XII.

LIMITATION, *See* Act No. XV of 1877, section 7; schedule II, Article 120.

See Act No. XV of 1877, section 14.

See Act No. XV. of 1877, schedule II, article 120.

See Act No. XII of 1881, sections 93, 94.

See Civil Procedure Code, section 244.

section 294.

See Execution of decree (3) and (4).

MAGISTRATE, Jurisdiction of—*See* Act No. XV of 1883, section 46.

MAINTENANCE, *See* Hindu law (2) and (4).

MARRIAGE. NULLITY OF. See Act No. IV of 1869, sections 17, 20.

MESNE PROFITS, See Execution of decree (1).

MINORITY, See Execution of decree (3).

MORTGAGE—(1) *Act No. II of 1882 (Transfer of Property Act), section 82—Purchase by mortgagee at auction of portion of the mortgaged property—Effect of such purchase in reducing the mortgage debt.* [When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. *Lakshmdas Ramdas v. Jambadas Shankar Lal* followed. *Nand Kishore v. Raja Hariroj Singh* and *Damera Kuar v. Bhagwant Singh* and *Channa Lal v. Anandi Lal* considered. *Mahabir Prasad Singh v. Macnaghten*, *Fauz Abzmat Ali Khan v. Jawahir Singh* and *Mahtab Singh v. Misri Lal* referred to.

..... *Bishashur Dial v. Ram Sarup* 284

(2) *Covenant for pre-emption of mortgaged property in favour of mortgagee—Collateral advantage—Covenant fettering redemption—Act No. II of 1882 (Transfer of Property Act), section 66.* [A provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced; but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness.

Held that a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property at a price fixed by reference to another share in the same village, was, *prima facie*, a good covenant and enforceable by the mortgagee. *Higgs v. Hoddinott*; *Santley v. Wilde*, and *Orby v. Trigg*, referred to.

..... *Bimal Jati v. Biranji Kuar* 234

..... See Civil Procedure Code, section 244.

(3) *Prior and subsequent incumbrancers, rights of—inter se—Act No. II of 1882 (Transfer of Property Act) section 85—Sale in execution of decree obtained by first mortgagee in a suit to which the second mortgagee was not a party—Rights of auction purchaser and mortgagor as regards the second mortgagee.* [A prior mortgagee, *K*, obtained a decree in a suit upon his mortgage, to which suit a puisne mortgagee, *G*, was not made a party, and subsequently one *B*, attached the decree, and, having put up the property for sale, purchased it himself. *G*, the puisne mortgagee, having brought a suit for redemption of *K*'s mortgage and sale of the property, *K* sold his rights to *P*, who was thereupon added as a defendant. *G* obtained a decree for redemption and sale.

Held per Banerji, J., that *P* was entitled to the whole amount which *G* had to pay for redemption of the prior mortgage, with the exception of the amount of the purchase-money paid by *B* at the auction sale, which amount, and which amount only, would be due to *B* or his representatives. *Dip Narain Singh v. Hira Singh* and *Baldeo Bharthi v. Hushtar Singh* approved.

• *Held* per Aikman, J., that the auction purchaser, *B* (or his representatives), was entitled to the whole amount to be paid by *G*

for redemption of the first mortgage. *Din Nahan Singh v. Har Singh* differed from, and *Baldeo Bantia v. Hushair Singh*, distinguished.

Wahid-un-nissa v. Gobur Khan Das

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MORTGAGE (4) *Sale of land and agreement for repurchase—Mortgage by conditional sale—Right to redeem—Intention of parties of 1798 and XVII of 1800—Inclusion of oral evidence to vary written instrument—Act No. I of 1872—(Indian Evidence Act), section 133—A deed of sale of land for value was accompanied by a deed of sale for repurchase, with power for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits.*

The vendor did not exercise his right of repurchase, but, after many years, gave notice of his intention to do so, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale.

Held; (1) that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not excluded, being excluded by the enactment in section 12 of the Indian Evidence Act, 1872.

This case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts.

(2) That there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan.

(3) The equity of redemption was rendered applicable to a mortgage of this class by the effect of the Regulation XVII of 1800. The Transfer of Property Act, 1882, section 58, defines a mortgage of this character, stating the already existing law and practice regarding it; but owing to its date did not apply in this instance.

(4) Redemption had been rightly decreed in the Courts below.

(5) Whether such a mortgage would be redeemable under the Regulation law independently of intention indicated in the instrument was not a point calling for decision. Indications in this case appearing in the deeds were (a), words in the agreement for repurchase similar to those in Regulation I of 1798, relating to the deposit of mortgage money in the Treasury, giving the like power to deposit; (b), the inclusion in the present security of a sum due on an account, open to be increased, other than the price fixed for the repurchase; and other matters. *Bhagwan Sakai v. Bhagwan Din* distinguished.

Balkishan Das v. W. F. Legge

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See Act No. IV of 1882, section 85.

See Act No. IV of 1882, section 90.

MUHAMMADAN LAW *Pre-emption—Invalid sale—Time when right of pre-emption arises.* No right of pre-emption arises upon a sale which, according to Muhammadan law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold; but if such sale become complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption

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arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of sale. *Begam v. Muhammad Yaqub*, referred to.

Najm-un-nissa v. Ajaib Ali Khan ... 343

MUHAMMADAN LAW *See* Pre-emption.

MUNICIPAL BOARD, *See* Suit.

———— Powers of ——— *See* Act No. XV of 1883, section 69

NOTIFICATION No. 458 of the 18th of March 1898. *See* Act No. XI of 1878, section 19(f).

ORDER or decree. *See* Civil Procedure Code, sections 363, 382, 501.

NULLITY OF MARRIAGE. *See* Act No. IV of 1869, sections 17, 20.

PARTIES—Liability of member of joint Hindu family *See* Hindu Law (5).

———— to an action, *See* Suit.

———— to appeal, *See* Civil Procedure Code, sections 372, 552.

———— to suit, *See* Civil Procedure Code, section 30

PARTITION, *See* Pre-emption

———— BY REVENUE COURTS, *See* Act No. XIX of 1873, section 107

PARTNERSHIP—*Arbitration—Authority of one partner to sue on behalf of the firm—Authority of one partner to bind the firm by a submission to arbitration—Act No. I of 1877 (Specific Relief Act), section 21.] Held that one partner, though entitled to bring a suit on behalf of the firm of which he is a member to recover a debt due to the firm, has no power, in the absence of special authority, to bind the firm by a submission to arbitration of the claim so brought. Stead v. Salt and Strangford v. Green referred to*

Ram Bhunose v. Kallu Mal

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PATWARI, *See* Act No. IX of 1872, section 23.

PLEAINT *See* Civil Procedure Code, section 214.

———— SIGNATURE OF ——— *See* Civil Procedure Code, sections 51, 578

PRE-EMPTION (1)—*Muhammadan law—Shias and Sunnis—Pre-emption claimed on ground of vicinage—Vendors and vendee Sunnis, pre-emptor a Shia.] Held that a Muhammadan of the Shia sect could not maintain a claim for pre-emption based on the ground of vicinage under the Muhammadan law when both the vendors and the vendee were Sunnis. Gobind Dayal v. Inayat-ullah and Pir Bakhs v. Saghra Bili referred to.*

Qurban Hussain v. Chote

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———— (2) *Wajib-ul-arz—Perfect partition of mahal—Act No. XIX of 1873, section 101—No new wajib-ul-arz framed on partition—Pre-emption claimed under wajib-ul-arz of undivided mahal—Custom—Co-sharers—Hissadar deh.] Where, on the perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, no new wajib-ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer. It depends in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom recorded, assuming that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to*

the contract or the custom. But there is a strong presumption against such claim, for pre-emption when made after perfect partition by persons who are no longer co-owners of the vendor; and where the language of the *wajib-ul-uz* is unambiguous this presumption may be decisive.

The *wajib-ul-uz* of a village forming one undivided *mahel* recorded in 1807, or by contract existing in favour of "*kissadhar d. l.*" in case of transfer by a "*kissadhar*" of his share of "*hissa*" to a co-partner. After a perfect partition on which no new *wajib-ul-uz* was formed, and a subsequent sale to a stranger of his share of the new *mahel*, a person who prior to the partition, was co-sharer of the venditor in the undivided *mahel*, but who, since the partition, owned a share only in one of the new *mahels*, claimed pre-emption under the old *wajib-ul-uz* as a "*kissadhar d. l.*"

Held by the Full Bench, upon the construction of the *wajib-ul-uz* that he was not entitled to pre-emption.

Dilgarni Singh v. Kalla Singh

PRE-EMPTION, *See* Mortgage (2).

----- *See* Nizam's Law

PRESUMPTION—*See* Construction of document

PROBATE, *See* Act No. V of 1851, section 3

PROCEDURE, *See* Civil Procedure Code, sections 293, 295, 41

----- *See* Criminal Procedure Code, section 203

----- *See* Indian—*See* Act No. XX of 1877 section 14.

Profits, suit for recorded sale of—*See* Act No. XII of 1851, sections 53, 94

PUBLIC NOTICE, *See* Act No. XLV of 1819, sections 269, 270

RAILWAY COMPANY—*See* Act No. IX of 1860, sections 7, 70

RECEIVER, *See* Civil Procedure Code, section 53

RECITAL IN DEED—Admissibility of evidence not to contradict—*See* Act No. I of 1872, section 92

REGULATION—170—*See* Mortgage (1)

----- 103—III, section 37—*See* Act No. I of 1872, sections 15, 90

----- 10—XXI, *See* Mortgage (1)

REMAND—*See* Acts—1871—XIV

REPRESENTATIVE, *See* Civil Procedure Code, section 74

REVENUE COLLECTOR, power to—*See* Act No. XIX of 1873, section 107.

REVERSIONERS, suit by—*See* Hindu Law (1)

RULES of the Court, Rule 9. *See* Civil Procedure Code, sections 369, 582, 591.

RES JUDICATA as between defendants—*See* Civil Procedure Code, sections 13, 544.

----- *See* Hindu Law (1)

SALE of house in default of payment of *takavi* loan—*See* Act No. XIX of 1873, sections 163, 167, 168

STAMP, *See* Act No. I of 1879, Schedule 1, Article 8.

STRIDHAN. *See* Hindu Law (6).

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SUCCESSION See Hindu Law (7).

SUIT *for declaration of right to be entered in list of candidates for appointment as member of a village panchayat*—*Suit brought against the Municipal Board for declaration of right to be entered in list of candidates for appointment as member of a village panchayat*. [While a plaintiff is entitled to be entered in the list of candidates for election as members of a Village Board, he is not entitled to bring his suit against the Board in its capacity as a body corporate. It was held that such a suit would lie against the Board, even if, which was not decided, it might be argued that the plaintiff, by the neglect in action of which, it was alleged, the plaintiff's name had been excluded from the list of candidates

Abdur Rahman v the Municipal Board of Kail

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SUIT, DISMISSAL OF—for default—See Civil Procedure Code, sections 102, 103, 157

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TAKAYI LOAN—Sale of house in default of payment of loan. See Act No XIX of 1873, sections 166, 167, 168

UNDER INFLUENCE See Act No IX of 1872, sections 15, 13, 19

VAKIL—See Letters Patent, 1855, para 8

VOLUNTEERS See Act No. XI of 1873, section 10 (f).

WAJIB UL ARZ See Proclamation

WIDOW—Hindu widows (1) and (2)

—alienation by (1)

WILL, See Act No V of 1851, section 3.